153

153-108

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED [illegible]

OCTOBER TERM, 18[illegible]

No. 1[illegible] 641

EMIL J. PEPKE, APPELLANT,

vs.

JOSEPH E. CRONAN, AS SHERIFF OF WALSH [illegible] NORTH DAKOTA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES [illegible] DISTRICT OF NORTH DAKOTA.

FILED FEBRUARY 1[illegible], 1894.

(15,506.)

(15,506.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1122.

EMIL J. PEPKE, APPELLANT,

vs.

JOSEPH E. CRONAN, AS SHERIFF OF WALSH COUNTY, NORTH DAKOTA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of *habeas corpus*	1	1
Exhibit A—Lease from J. C. Oswald & Co. to John Murdock, February 1, 1893	7	6
B—Summons and complaint	9	8
C—Sheriff's return	13	11
D—Injunction order	14	12
D^2—Affidavit of F. E. Johnson	15	13
D^3—Search warrant	16	14
E—Sheriff's return	17	15
F—Order to show cause	18	16
G—Answer to order to show cause	19	17
H—Judgment for contempt	20	18
I—Commitment	21	19
Writ of *habeas corpus*	22	19
Motion to dismiss	23	20

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 26, 1894.

	Original.	Print.
Return to writ	24	21
Stipulation as to statutes of North Dakota	25	22
Order beginning hearing	26	23
Order submitting cause	26	23
Order discharging writ	26	23
Opinion	27	24
Assignment of errors	27	24
Petition for appeal	30	26
Order allowing appeal, &c.	31	26
Bond on appeal	32	27
Supersedeas bond and order	34	29
Notice of appeal	36	30
Stipulation waiving citation	37	31
Clerk's certificate	38	32

1 UNITED STATES OF AMERICA, }
District of North Dakota. }

United States District Court.

Pleas before the Honorable Alfred D. Thomas, judge of the district court of the United States for the district of North Dakota, sitting in said court at the term of May, 1893.

In the Matter of the Petition of EMIL J. PEPKE for His Discharge on *Habeas Corpus*.

Be it remembered that on the 9th day of December, 1893, a petition was filed in the office of the clerk of said United States district court in the above-entitled matter; which said petition is in words and figures following, to wit:

In the District Court of the United States for the District of North Dakota.

To the Honorable Alfred D. Thomas, United States district judge for the district of North Dakota:

The petition of Emil J. Pepke respectfully represents that your petitioner is now illegally confined and in the custody of J. E. Cronan, Esq., as sheriff of the county of Walsh, in the said State of North Dakota, by virtue of a commitment under an illegal sentence, order, decree, and judgment of the district court of North Dakota for the first judicial district, the said sentence, order, decree, and judgment being void and in law a nullity for want of jurisdiction in the said court to pass it upon and against your petitioner, which said sentence, order, decree, and judgment was pronounced in a case and proceeding entitled, in the said district court for the first judicial district in the State of North Dakota, being in the county of Walsh and State of North Dakota, as follows: The State of North Dakota *ex rel.* William H. Standish, attorney general, plaintiff, against Charles Tedford and J. C. Oswald, defendants; and your petitioner further states that a copy and transcript of the record of said case and proceeding, including the record relating to and embracing your petitioner's sentence, is herewith presented.

Your petitioner further shows to the court that on the 1st day of February, 1893, and for a long time prior thereto and ever since, John C. Oswald, one of the defendants in said proceeding previously herein referred to, together with one Theo. Basting, were, have been,

2 and now are the sole owners in fee simple of lot ten, in block thirty, in Grafton, Walsh county, State of North Dakota, together with all the buildings and improvements thereon; that on the said 1st day of February the said John C. Oswald and Theo. Basting, as the sole owners as aforesaid, made, entered into, and executed to one John Murdock, as lessee thereof, — the whole of the said premises, which said lease was in writing and signed

and executed and delivered by each of the parties thereto, a copy of which lease is hereto attached and made a part hereof and marked Exh. A; that in and by the terms of said lease it was provided as follows: "That said lessee will not keep or allow any liquors or beverages of an intoxicating nature or tendency to be sold, kept, or tolerated on said premises nor any gambling or immoral practices." Affiant further states that afterwards and during the pendency of said lease an action and proceeding upon the information of one F. E. Johnson was commenced and instituted, which said action and proceeding was entitled, in said county of Walsh, in the district court, in the name of the attorney general of said State of North Dakota and against the said Charles Tedford and John C. Oswald by name; and affiant further states that he annexes to this petition and makes a part hereof, designated as Exh. B, a copy of said complaint.

Affiant further states that no process in said matter was ever served upon the said John C. Oswald nor upon the said Theo. Basting, and that the sheriff's return of the service of the summons, complaint, affidavit for search warrant, injunctional order, and search warrant is hereto attached and made a part hereof and marked Exh. C.

There is also attached to this petition and marked as Exh. D 1, which is made a part hereof, a true copy of a certain order, known and designated as an injunctional order, signed by presiding judge of the said district court, and which said injunctional order was made, signed, and issued as a part of said proceedings; that at the same time and as a part of said proceeding there was filed and presented to the said court an affidavit, a copy of which is hereto attached and made a part hereof and marked Exh. D 2; that in pursuance of said affidavit and as a part of said transaction and proceeding the said court thereupon made, entered, and issued its order and search warrant, in and by the terms of which the said sheriff or any constable or marshal of said Walsh county was ordered and directed to take and hold possession of said premises and keep the same closed until final judgment in said action and proceeding. A copy of such order and search warrant is hereto attached and made a part hereof and marked Exh. D 3.

3 Your petitioner is informed and believes and alleges the fact to be that the said sheriff of the said Walsh county, under and pursuant to the terms of said injunctional order and order and search warrant, went into possession of and closed the building upon the said premises and the improvements thereon, which said premises are the same premises referred to and designated in all the said proceedings.

And your petitioner further shows and represents that no further proceedings were ever had in said matter subsequent to the closing of said building and premises by the said sheriff as aforesaid except the proceedings herein referred to as having been instituted to hold and adjudge this petitioner in contempt.

Your petitioner further represents that the owners of said building, John C. Oswald and Theo. Basting, now and at all times here-

tofore since before the making of said lease, to wit, for more than ten years last past, have been residents and citizens of the county of Hennepin, in the State of Minnesota; that no service of any of said papers, process, or instruments was ever made on either of the said Oswald or the said Basting.

Your petitioner further states that he is informed and believes and alleges the fact to be that after said premises were closed under said order by the said sheriff the said owners of the said building, upon being informed of the fact that the said premises had been closed as stated, terminated the said lease by giving three days' notice thereof in writing to the lessee; and your petitioner further states that if any spirituous or intoxicating liquors or liquors of that nature or tendency were ever tolerated, kept, sold, or disposed of upon, in, or about the said premises during the pendency of the said lease or at all since the said Oswald and Basting became the owners of the said property, which was long prior to the 1st day of February, 1893, that such fact was not at any time known to the said Oswald or the said Basting, nor did either of them ever have any notice or knowledge of any claim or pretention on the part of anybody that any such liquors were tolerated, kept, sold, or disposed — upon, in, or about said premises, or that said premises were or had been in any manner used or suffered to be used in violation of any law or statute until after the making of the injunctional order herein referred to and the closing of the said premises by the sheriff thereunder.

4 Your petitioner further shows to the court and states that heretofore, to wit, on the 25th day of October, 1893, this petitioner then and there, by the authority and consent of the said sole owners of the said property, John C. Oswald and Theo. Basting, not forcibly but peaceably and without violence but by means of a key fitted to the lock of said building, went into possession of the same.

Your petitioner is informed and believes and so states that afterwards, to wit, on the 20th day of November, 1893, the said sheriff of said Walsh county, by affidavit and other proof, complained of the entry and possession of this petitioner in the said property as aforesaid, and your petitioner attaches to this petition a copy of the said affidavit and proof, which copy is marked Exh. E and made a part hereof.

That thereupon and in pursuance of the said affidavit and proof the said district court for the first judicial district of North Dakota for the said county of Walsh caused to be issued its process and order requiring this petitioner to appear before the said court on the 5th day of December, 1893, then and there to show cause why he should not be punished for entering and taking possession of said premises and why he should not be punished for a disobedience of the said injunctional order. A true copy of said process and order to show cause is hereto attached and made a part hereof and marked Exh. F.

That this petitioner was arrested under the said process, carried before the said district court, and as and for cause shown made, filed, and caused to be filed his answer to said process and order,

in which the said petitioner showed to said court, which was taken as true and confessed and admitted by the prosecution, that his said entry upon the said premises was made under and with the consent and permission of the true owners of said property, to wit, John C. Oswald and Theo. Basting; that a true copy of said answer of this petitioner is hereto attached and made a part hereof and marked Exh. G.

That thereupon, on the 5th day of December, 1893, the said district court for the said county of Walsh, in the first judicial district of North Dakota, made, entered, and filed its order, judgment, decree, and sentence, which ordered and provided as follows: "It is further ordered, adjudged, and decreed that the said Emil J. Pepke be punished for such contempt by imprisonment in the county jail, in the county of Walsh aforesaid, for the period of ninety days, commencing at the hour of noon, today, and that he pay a fine of two hundred dollars, or in default thereof that he be imprisoned in such jail for the additional period not to exceed two days;" a full copy of which said order and sentence is hereto attached and made a part hereof and marked Exh. H; and thereupon and in pursuance of said order, judgment, decree, and sentence there was made and issued out of said court a commitment to the sheriff of said Walsh county, a copy of which is hereto attacyed and made a part hereof and marked Exh. I; and your petitioner further represents and shows that it is under and by virtue of said commitment that your said petitioner is now confined and in custody as above stated.

Your petitioner further shows that he is informed and believes and states the fact to be that such proceedings were had when the said order, judgment, decree, and sentence was made and commitment issued under and by virtue of the pretended provisions of an act entitled "An act to prescribe penalties for the unlawful manufacture, sale, and keeping for sale intoxicating liquors, and to regulate the sale, barter, and giving away of such liquors for medical, scientific, and mechanical purposes," and known as chapter 110 of the laws passed at the first session of the Legislative Assembly of the State of North Dakota; which said chapter 110, and particularly section 13 thereof, your petitioner submits *are* unconstitutional, void, and invalid, and conferred upon said district court of North Dakota no jurisdiction whatever to pass upon this petitioner the sentence, order, judgment, and decree referred to, and afforded no authority for the commitment under which your petitioner is now held. Said chapter 110 is hereby made a part of this petition.

The said chapter 110, and particularly section 13 thereof, your petitioner respectfully contends and submits *are* unconstitutional, invalid, and void under the fourteenth amendment to the Constitution of the United States of America.

Your petitioner further states, contends, and submits that the said section 13 and all the provisions thereof providing for the closing of leased premises *is* in violation of section 61 of the Constitution of North Dakota.

Your petitioner further refers to the said constitution of the State

of North Dakota and the enabling act of the Congress of the United States of America, approved February 22nd, 1889, and more particular- entitled "An act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," and hereby incorporates herein and makes a part hereof the said constitution of North Dakota and the said enabling act.

Your petitioner further shows and alleges that said chapter 110 is based upon article 20 of the said constitution of the State of North Dakota, and that said article 20 is void because it was never approved by the qualified voters of the proposed State of North Dakota, as required by section 8 of the said enabling act; and in this behalf your petitioner further states and alleges that the constitutional convention for the said State of North Dakota referred to in the said enabling act submitted to the people of the said proposed State of North Dakota a constitution for ratification or rejection, as provided in section 8 of said enabling act; that at such election the total vote cast for governor was 38,098, and for other State officers and member of Congress substantially the same number of votes; that said votes were all cast, as affiant is informed and believes, by qualified voters of the said proposed State.

Your petitioner further states that the total number of votes case in favor of article 20 of the said constitution was 18,552, and the total number of votes cast at such election against the said section was 17,393; and your petitioner further shows that the said article 20 of the constitution of the State of North Dakota was not passed nor was it adopted by a majority of all the votes cast at such elecetion as provided under and by section 8 of the said enabling act.

Your petitioner further shows and represents that the said chapter 110 is not a valid law, because it was passed in December, 1889, at wh.h time the Legislative Assembly had no legislative power under said constitution and enabling act, their term for serving and time for convening under said constitution not having arrived.

Your petitioner further shows to the court that the said chapter 110 was *jot* properly or constitutionally enacted by the Legislative Assembly of North Dakota, as it is in conflict with section 13 of article one of the Constitution of the State of North Dakota and in conflict with the Constitution of the United States of America, as the effect of said act is to put and place a person twice in jeopardy for the same offence.

7 And your petitioner therefore prays at your honor's hands the benefit of the writ of *habeas corpus*, to be directed to the sheriff of said Walsh county, commanding him to have before your honor at a day and place to be named therein the body of your petitioner, together with the cause of his capture and detention, to undergo and receive whatsoever your honor shall then and there

consider of him in that behalf; and your petitioner will ever pray, &c.

Dated December 9th, 1893.

EMIL J. PEPKE.

DISTRICT OF NORTH DAKOTA, *ss:*

Emil J. Pepke, being duly sworn, says that he has heard read the foregoing petition and knows the contents thereof; that the said petition is true except as to those matters therein stated on information and belief, and as to those that he believes it to be true.

EMIL J. PEPKE.

Subscribed and sworn to before me this 9th day of December, 1893.

[SEAL.] J. A. MONTGOMERY,
Clerk U. S. District Court, N. Dakota.

SPOONER & TAYLOR,
Att'ys for Petitioner.

EXHIBIT A.

This indenture, made this 1st day of February, A. D. 1893, by and between J. C. Oswald & Co., of Minneapolis, Minnesota, party of the first part, lessors, and John Murdock of Grafton, North Dakota, party of the second part, lessee, witnesseth: That the said part- of the first part, in consideration of the rents and covenants hereinafter mentioned, do hereby demise, lease and let unto the said party of the second part, and the said party of the second part does hereby hire and take from the said party of the first part the following-described premises situated in the county of Walsh in the State of North Dakota, lot ten in block thirty in Grafton, to have and to hold the said premises just as they are, without any liability or obligation on the part of the lessors of making any alterations, improvements or repairs of any kind on or about said premises, for the term of one year from February 1st, 1893, for the following purposes, to wit: A restaurant and lunch counter, and the upstairs as a residence for the lessee, yielding and paying therefore
8 the rent of eighteen dollars per month; and the said lessee does covenant to pay the said rent in equal monthly payments in advance, to wit: the sum of eighteen dollars on or before the 1st day of every month during the said term, and that said lessee will quit and deliver up said premises to the said lessor, peaceably and quietly at the end of the aforesaid term or at any previous termination thereof for any cause, in as good order and condition and state of repairs, reasonable use and wearing thereof and inevitable accidents excepted, as the same now are or may be put into by the lessors; that said lessee will keep said premises con-

tinually in a neat, clean, and respectable condition, including the water-closet, and will keep the sidewalks in front and along said premises cleared of ice and snow, or other obstructions or objectionable things, if such clearing shall be ordered or required by municipal authority; that said lessee will not keep or allow any liquors or beverages of *of* any kind of an intoxicating nature or tendency to be sold, kept, or tolerated on said premises, nor any gambling or other immoral practices; that said lessee will not make or suffer any waste thereon or thereof, and will not assign or underlet said premises nor any part thereof without the consent of the lessors, written or signed on the back of this lease; said lessee also agrees to replace all glass broken on said premises during said term, and pay for all the city water used thereon during said time, and not to use said premises nor any part thereof for any purposes called extra hazardous by insurance companies, and if said monthly payments, or either of them, whether the same be demanded or not, are not paid when they become due; or if said leased premises shall be appropriated to or used for any other purpose or use than is hereinbefore specified; or if any liquor, gambling or any other immoral practices are allowed on said premises, or any damage or waste shall be made thereon; or if any part of said premises shall be underlet, or this lease be assigned without the consent of the lessors on the back of this lease as above specified; or if any term, condition or covenant of this lease on the part of the said lessee to be by said lessee kept or performed, shall be violated or neglected, then and in either of said cases the said lessee does hereby authorize and fully empower said lessors or their agent to cancel and annul this lease at once, and to re-enter, and take possession of said premises immediately, and by force, if necessary, without any previous notice of intention to re-enter, and remove all persons and their property therefrom, and to use such force and assistance in effecting and perfecting such removal as said lessors may deem advisable to recover at once full and exclusive possession of all of said demised premises, whether in possession of said lessee or a third person, or vacant; or said lessors or their agent at their option at any time after said default or violation of condition or covenant, re-enter and take possession of said premises, without such re-entering working a forfeiture of the rents to be paid and the covenants to be kept by said lessee for the full term of said lease. That in case the buildings on said demised premises shall, without any fault or neglect on the part of the said lessee or of his servants or employees, be destroyed, or be so injured by the elements or any cause, as to be untenable and unfit for occupancy, then the liability of the lessee for the rent of said premises thereafter, and all right to the possession thereof, shall at once cease. And it is mutually agreed, that all the covenants, terms and conditions of this lease shall extend, apply to and firmly bind the heirs, executors, administrators, and assigns of the respective parties hereto as fully as the respective parties are themselves bound.

9

In testimony whereof, both parties have hereunto set their hands and seals the day and year first above written.

In duplicate.

J. C. OSWALD & CO. [SEAL.]
JOHN MURDOCK. [SEAL.]

Signed, sealed, and delivered in presence of—
EDWIN AICH, } As to J. C. Oswald.
GEO. E. RAY, } As to John Murdock.
J. A. DE LANCY, }

(Duly acknowledged.)

EXHIBIT B.

STATE OF NORTH DAKOTA } ss:
County of Walsh, }

In District Court, First Judicial District.

THE STATE OF NORTH DAKOTA *ex Rel.* of WM. H. STANDISH, as Att'y Gen'l of State of North Dakota, Plaintiff,
against
—— TETFORD & J. C. OSWALD, Defendant-. } Summons.

The State of North Dakota to the above-named defendant-:

10 You are hereby cummoned and required to answer said complaint of the complainant in above-entitled action, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber, at his office, in Bismarck, N. D., within thirty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated at Bismarck, N. D., June 24, 1893.

W. H. STANDISH,
As Att'y Gen'l of the State of North Dakota, Plaintiff's Attorney.

STATE OF NORTH DAKOTA, } ss:
County of Walsh, }

In District Court, First Judicial District.

STATE *State* OF NORTH DAKOTA *ex Rel.* of WM. H. ——, as Att'y Gen'l of State of North Dakota, Plaintiff,
against
—— TETFORD & J. C. OSWALD, Defendants.

The plaintiff, by William H. Standish, a resident and citizen of North Dakota and att'y gen'l of said State, complains and alleges that he does not know the given name of said defendant Tetford.

I.

That he, Standish, now is and since January 3, 1893, has been the duly elected and qualified attorney general of the State of North Dakota, and that the provisions of the prohibition law of said State are not now fully enforced in said county of Walsh, and that said Tetford's name is unknown to plaintiff.

II.

That the defendants since the 1st day of May, 1893, and at and previous to the commencement of this action have been and now are parties to the maintenance of a common nuisance at and upon the following-described premises, situated in the city or town of Grafton, county of Walsh and State of North Dakota, to wit: Lot 10 of block 30 of the town or city of Grafton aforesaid, as shown by the plat thereof, of record in the register of deeds' office of said Walsh county, to which reference is made for a more particular description thereof.

III.

That the said defendant Tetford, whose given name is un-
11 known, since the first day of May, 1893, and at sundry and divers times between that date and the date of the commencement of this action, at and upon the premises described in paragraph II of this complaint, sold, bartered, and gave away intoxicating liquors, in violation of the provisions of the laws of the State of North Dakota pertaining to the prohibition of the manufacture and sale of such liquors (the same being chapter 110 of the Laws of 1890), and the said defendant J. C. Oswald *were* and *are* concerned, engaged in, and permitted the keeping of intoxicating liquors for illegal sale and use, in violation of law, at the time and on the premises hereinafter described.

IV.

That at the time hereinafter mentioned the said defendant Tetford kept, used, and maintained the aforesaid premises described in paragraph II of this complaint as a place where persons were and are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, in violation of the provisions of the laws of the State of North Dakota pertaining to the prohibition of the manufacture and sale of such liquors, and the said defendant Oswald was and *are* concerned, engaged in, and permitted said place to be kept for persons to resort for the purpose of drinking intoxicating liquors as a beverage in manner and form as before described.

V.

That at the time and place hereinbefore, in paragraph II of this complaint, described the defendant Tetford kept intoxicating liquors for sale, barter, and delivery, in violation of the laws of the State of North Dakota hereinbefore described, and that at such times said

defendant so kept in manner and form aforesaid whiskey and beer and other intoxicating liquors.

VI.

That no permit has been issued to said defendant Tetford by the county judge of said county of Walsh, North Dakota, and that said defendant is not a register- pharmacist or druggist.

VII.

That the defendant J. C. Oswald owns and controls the premises in paragraph II described herein, in which the nuisance complained of exists, and owned said premises at and previous to the commencement of this action and allowed and permitted the ma-ntenance of said nuisance, as set forth in this complaint.

12 VIII.

That unless restrained by order of this court the said defendant Tetford will, as plaintiff believes, continue to maintain the nuisance complained of herein or a similar nuisance at some other place within the county and State aforesaid.

IX.

That unless restrained by the order of this court the said defendant J. C. Oswald will continue to permit and allow the maint*ai*nance of the nuisance hereinbefore complained of.

Wherefore the said Wm. H. Standish, as att'y gen'l of N. D., for and on behalf of the State of North Dakota prays judgment—

First. That said business and place be adjudged a common nuisance and that the same be abated in due form of law.

Second. That the said defendant Tetford — h- clerks, servants, agents, and employés be permanently enjoined from in any manner, personally or otherwise, unlawfully disposing of intoxicating liquors or being in any manner illegally concerned, engaged, or employed in keeping said liquors for sale or keeping and maintaining a place where persons are allowed to resort for the purpose of drinking intoxicating liquors as a beverage.

Third. That the defendant J. C. Oswald be permanently enjoined from in any manner allowing or permitting the use of said premises hereinbefore described as a place for the unlawful keeping or selling of intoxicating liquors or as a place for persons to resort for the purpose of drinking intoxicating liquors as a beverage.

Fourth. That a temporary injunction be granted during the pendency of this action.

Fifth. That the plaintiff recover from said defendants Tetford & J. C. Oswald the costs of this action, together with reasonable attorney's fees, and that the property hereinbefore described be made subject to an execution for the payment thereof.

Sixth. That plaintiff have such further, other, and proper relief as to the court may seem just and proper.

W. H. STANDISH,
Att'y Gen'l of the State of N. Dakota,
Attorney for Plaintiff.

STATE OF MINNESOTA, }
County of Ramsey, } ss:

F. E. Johnson, being duly sworn, on his oath says that he has heard read the foregoing complaint, knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

F. E. JOHNSON.

13 Subscribed and sworn to before me this 23rd day of June, 1893.

—— ——,
[SEAL.] *Notary Public, Ramsey County, Minnesota.*

EXHIBIT C.

STATE OF NORTH DAKOTA, }
County of Walsh, } ss:

In District Court, First Judicial District.

THE STATE OF NORTH DAKOTA *ex Rel.* of W. H. STANDISH, as Attorney Gen. of the State of North Dakota, Plaintiff,
against
—— TETFORD and J. C. OSWALD, Defendants.

I, J. E. Cronan, sheriff of Walsh county, State of N. Dak., hereby certify and return that the annexed summons, complaint, affidavit for search warrant, injunctional order, and search warrant came to my hands for service and execution on the 7th day of July, 1893, and that on the 7th day of ——, 1893, I served the same by delivering to and leaving with one of the defendants, Tetford, and J. A. Delaney personally true and correct copies of said summons, complaint, affidavit for search warrant, injunctional order, and search warrant. I also certify and return that at said time I took into my actual possession the premises described in said injunctional order, to wit, lot number 10, in block numbered 30, in the city of Grafton, in said county and State, together with all personal property of every nature and description found on said premises, and by virtue of said search warrant I carefully and diligently searched said premises for intoxicating liquors, and after due and diligent search I found the following-described personal property on said premises, a true inventory of which is given below as follows, to wit: 1 bar, 1 card table, *i* refrigerator, 6 chairs, 21 bottles California pop, 41 bottles Belfast ginger ale, 6 bottles nerve food, 17 bottles Schlitz porter, 2 btls. sour-mash whiskey, 1¾ btls. Old Taylor whiskey, ½ —— syrup, 1 b'tle Hennesey cognac brandy, 4 btls. syrup—part full, 2 half *of* btls. of old crow whiskey, 3 bottles whiskey, ½ gal. brandy, 1

qt. gin, 1 qt. alcohol, 10 bottles—part full—unknown, 1 sideboard, 12½ bbls. beer, 4 cases Milwaukee beer, 5 kegs unknown, 2 btls. mineral water, — cigars, ¾ case cabinet wine. I also certify and return that at the same time and place I took into my actual possession the wooden building on said premises, together with said personal property, all of which I now actually hold subject to the order of said court.

Given under my hand this 20th day of July, 1893.

J. E. CRONAN,
Sheriff of Walsh County, N. Dak.

(Indorsed:) "State of North Dakota, county of Walsh, *ss.* Office of clerk dist. court. Filed for record in this office this 31st day of July, A. D. 1893, at 10 o'clock a. m. and recorded on page — *or* Book —. J. P. Slette, clerk dist. court, by Ole Omnson, deputy."

EXHIBIT D.

STATE OF NORTH DAKOTA, *County of Walsh*, } *ss*:

In District Court, First Judicial District.

THE STATE OF NORTH DAKOTA *ex Rel.* WM. H. STANDISH, as Att'y Gen'l of State of North Dakota, Plaintiff, *against* —— TETFORD & J. C. OSWALD, Defendants. } Injunctional Order.

It appearing to the satisfaction of the court by the verified complaint and affidavit of F. E. Johnson —— and ——, hereto attached, and the statute in such case made and provided that the defendants should be restrained from the commission of acts hereinafter enjoined, and the commission or continuance of the acts set forth in the complaint during the pendency of this action would produce public injury, and it appearing by said complaint and affidavits that the defendants during the pendancy of this action are doing or procuring and suffering to be done and threaten or are about to do, procure, and suffer to be done the acts hereinafter enjoined:

Now, therefore, on motion of Wm. H. Standish, as att'y gen'l of North Dakota, it is ordered that the defendants, —— Tetford and J. C. Oswald, and each of them, and their agents, attorneys, and servants and each of them, are hereby enjoined and restrained until the future order of this court from using or permitting to be used the following-described premises, to wit: Lot ten (10) of block
15 thirty (30) of the town or city of Grafton and State of North Dakota, as shown by the plat thereof of record in the register of deeds' office of said Walsh county, to which reference is hereby made for a more particular description thereof, as a place for the sale of intoxicating liquors or as a place for keeping for sale intoxicating liquors, of any kind, character, or description, otherwise than by the authority of a druggist's permit, as provided by law, and

from permitting intoxicating liquors to be drank in, upon, or about said premises; and the defendants and each of them are enjoined and restrained until the further order of the court from keeping upon or permitting to be upon the said premises hereinbefore described, and from selling, bartering, or giving away, and from keeping for sale, barter, or use about said premises, and from permitting to be drank upon said premises, and vinous, spiritious, fermented, or other intoxicating liquors, and from permitting said liquors to be sold, bartered, or given away or to be kept for sale, barter, or use in or about said premises.

Dated at Grand Forks, North Dakota, this 7th day of July, A. D. 1893.

By the court:

CHARLES F. TEMPLETON, *Judge.*

EXHIBIT D 2.

STATE OF NORTH DAKOTA, } ss:
County of Walsh, }

In District Court, First Judicial District.

THE STATE OF NORTH DAKOTA *ex Rel.* W. H. STANDISH, as Att'y Gen'l of the State of North Dakota, Plaintiff,
against
—— TETFORD and J. C. OSWALD, Defendants.

STATE OF NORTH DAKOTA, } ss:
County of Walsh, }

F. E. Johnson, being duly sworn, on his oath deposes and says that intoxicating liquors, to wit, whiskey, beer, and other intoxicating liquors, are kept for sale, sold, bartered, and given away on the following-described premises, to wit, lot 10 of block thirty (30), in the town or city of Grafton aforesaid, as shown by the plat thereof of record in the register of deeds' office of said Walsh county, to which reference is made for a more particular description thereof.

16 And that one Tetford, given name unknown to affiant, is conducting said business and making such unlawful sales, and the basis of affiant's knowledge and belief is as follows: That on the 14th day of May, 1893, affiant was in said premises and then and there bought from said defendant, Tetford, whiskey to be then and there drank by him as a beverage & which was then and there sold to him for that purpose and some of it drank by affiant at that time and place and which affiant knew to *be* have been intoxicating at the time so sold and delivered by said defendant, Tetford, to said affiant.

And a search warrant is prayed for to the end that the said premises may be searched at the time of the service of an injunctional order in the above-entitled proceeding, pursuant to section 13 of chapter 110 of the laws of 1890.

F. E. JOHNSON.

Subscribed and sworn to before me this 23rd day of June, A. D. 1893.

[SEAL.] G. L. ST. JOHN,
Notary Public, Ramsey Co., Minnesota.

EXHIBIT D 3.

STATE OF NORTH DAKOTA, } ss:
County of Walsh, }

In District Court, First Judicial District.

THE STATE OF NORTH DAKOTA *ex Rel.* W. H. STANDISH, as Att'y Gen'l of State of North Dakota, Plaintiff, *against* —— TETFORD & J. C. OSWALD, Defendants. } Search Warrant.

The State of North Dakota to the sheriff or any constable or marshal of Walsh county:

In the above-entitled action a summons and complaint have been duly issued and an injunctional order restraining the above-named defendant, Tetford, from selling or keeping for sale, barter, or delivery any intoxicating liquors of any kind on the following-described premises, to wit: Lot ten (10) of block thirty (30) of the town or city of Grafton, State of North Dakota, and county of Walsh, as shown by the plat thereof of record in the register of deeds' office of said Walsh county, to which reference is hereby made for a more particular description thereof, having been gra-ted by the court herewith, and an affidavit having been presented to this court, together with the papers aforesaid, setting forth
17 that intoxicating liquors, to wit, whiskey, beer, and other intoxicating liquor, are kept for sale and are sold, bartered, and given away on the following-described premises, to wit, those above described:

Now, therefore, you, as sheriff of said county aforesaid, are hereby commanded at the time of serving the aforesaid writ of injunction, bearing even date herewith, to diligently search the premises above described and carefully invoice all of the articles found therein used in or about the carrying on of the business aforesaid, and if, upon such search, you shall find upon said premises any intoxicating liquors of any kind you shall take the same into your custody and securely hold the same to abide the final order and judgment in this action, and also take and hold possession of such premises and keep the same closed until such final judgment.

Hereof fail not.

Dated this 7 day of July, A. D. 1893.

By the court:

CHARLES F. TEMPLETON, *Judge.*

EXHIBIT E.

In District Court, First Judicial District of North Dakota, County of Walsh.

THE STATE OF NORTH DAKOTA *ex Rel.* WILLIAM H. STANDISH, Attorney General, Plaintiff,
against
—— TEDFORD and J. C. ASWALD, Defendants.

STATE OF NORTH DAKOTA, } ss:
County of Walsh, }

J. E. Cronan, being duly sworn according to law, deposes and says that he is the sheriff of the county of Walsh aforesaid; that there came into his hands on or about the 12th day of July, 1893, in the above-entitled action an injunctional order, search warrant, and other papers to be served by him as the sheriff of said county, and, by virtue of said search warrant issued by said court by the Hon. Charles F. Templeton, judge thereof, he searched the premises described as lot ten (10), block thirty (30), of the town of Grafton, county of Walsh and State of North Dakota, occupied by the defendant Tedford, and found intoxicating liquors, to wit, 7 cases of beer, about 1 doz. kegs beer, and whiskey, wine, &c., and that in obedience and in pursuance to said warrant he took and held possession of the personal property found on said premises, and also took and held possession of said premises and kept the same from the 12th day of July, 1893, until on or about the 25th day of October, 1893, when Emil J. Pepke broke into said building upon said premises and has continued to interfere with the possession of the deponent, as sheriff aforesaid, ever since.

18

Wherefore deponent prays a warrant may be granted for the arrest of said Emil J. Pepke, and that he show cause before the court why he should not be punished for contempt as interfering with deponent's possession of said property.

J. E. CRONAN.

Subscribed and sworn to before me this 20th day of November, 1893.

J. E. GRAY,
[SEAL.] *Notary Public, Walsh County, North Dakota.*

EXHIBIT F.

In District Court, State of North Dakota, First Judicial District of North Dakota, County of Walsh.

THE STATE OF NORTH DAKOTA *ex Rel.* WILLIAM H. STANDISH, Attorney General, Plaintiff,
against
—— TEDFORD and J. C. OSWALD, Defendants.

The State of North Dakota to the sheriff of the county of Walsh:

In the above-entitled action a summons and complaint having been duly issued, and an injunctional order restraining the above-named defendants from selling or keeping for sale, barter, or delivery any intoxicating liquors of any kind upon the following-described premises, to wit: Lot ten (10), block thirty (30), of the town, now city, of Grafton, county of Walsh and State of North Dakota, having been granted by the court, and an affidavit having been presented to the court, together with the papers aforesaid, setting forth that intoxicating liquors, to wit, beer and whiskey, were kept for sale and were being sold, bartered, and given away upon said premises, and thereupon the court did issue a warrant whereby the sheriff of the said county was commanded at the time of serving the aforesaid injunction to diligently search the premises above described and carefully invoice all the articles found therein used in or about the carrying on of the business aforesaid, and if upon such search he should find upon said premises any intoxicating liquors of any kind he should take the same into his custody, and
19 also take and hold possession of said premises and keep the same closed until final judgment should be had in said action;

And whereas it appears by the affidavit of J. E. Cronan, sheriff of said county of Walsh, that he served said summons, complaint, injunctional order, and search warrant on or about the 12th day of July, 1893, and that he searched the premises above described, occupied by the defendant Tedford, and found thereon intoxicating liquors, to wit, seven cases of beer, about one dozen kegs of beer, and quantity of whiskey, wine, etc., and that in obedience to and pursuant to said warrant he took and held possession of the personal property found on said premises, and also took and held possession of such premises, to wit, said lot ten (10), block thirty (30), in Grafton aforesaid, and kept the same closed from about the 12th of July, 1893, until or or about the 25th day of October, 1893, and that on or about said last date one Emil J. Pepke broke into said building upon said premises and has continued to interfere with the possession of said premises by said sheriff as aforesaid ever since:

Now, therefore, it is hereby ordered, on motion of James H. Bosard, assistant attorney general for the county of Walsh and State aforesaid, that the said Emil J. Pepke show cause before me,

at Grand Forks, State of North Dakota, on the fifth day of December, 1893, at ten o'clock in the forenoon of said day, why he should not be punished for interfering with the possession of said premises as in contempt; and it is further ordered that a copy of the affidavit of said sheriff and a copy of this order be served upon the said Emil J. Pepke on or before the fifth day of December, 1893.

Dated at Pembina, N. D., this 25th day of November, 1893.

CHARLES F. TEMPLETON,
Judge of District Court.

EXHIBIT G.

STATE OF NORTH DAKOTA, } ss:
County of Walsh, }

1st Jud. Dist.

THE STATE OF NORTH DAKOTA *ex Rel.* WM. H. STANDISH, Att'y Gen'l, Plaintiff,
vs.
CHARLES TEDFORD & J. C. OSWALD, Defendants.

STATE OF NORTH DAKOTA, } ss:
County of Grand Forks, }

20 Comes now E. J. Pepke, and, being duly sworn, says in answer to the order to show cause herein, dated November 25th, 1893, that he did or or about October 25th, 1893, enter into possession temporarily of the premises described in said order, but also states that such entry was made under and with the consent and permission of the true owners of said premises, to wit, John C. Oswald and Theo. Basting, who were then and there at all such times the legal and true owner- thereof. Affiant denies that he broke into the said building, but states that his entry was peaceable and under the authority and permission as above stated. And affiant further states that never since he entered said premises as aforesaid have there been any liquors of any kinds or character whatever upon or about said premises, now have the said premises been used or devoted to any purpose contrary to law.

EMIL J. PEPKE.

Subscribed and sworn to before me this Dec. 5th, 1893.

[SEAL.] L. K. HASSELL,
Clerk Dist. Court.

EXHIBIT H.

STATE OF NORTH DAKOTA, }
County of Walsh. }

In District Court, First Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* WM. H. STANDISH, Attorney General, Plaintiff,
vs.
CHARLES TEDFORD and J. C. OSWALD, Defendants.

In the above-entitled action a summons and complaint having been duly issued, and an injunctional order restraining the above-named defendants from selling or keeping *from* sale, barter, or delivery any intoxicating liquors of any kind on the following-described premises, to wit, lot ten, block thirty, of the town, now city, of Grafton, Walsh county, North Dakota, having been granted by the court, and it having been ordered by the court that the sheriff of said Walsh county take and hold possession of said premises and keep the same closed until the final judgment should be had in said action, and it having been made to appear in this court upon the affidavit of J. E. Cronan, sheriff aforesaid, that under and — virtue of said injunctional order, made on or about the 12th day of July, 1893, — to the 25th day of October, 1893, when one Emil J. Pepke broke into said building upon said premises, and has continued to interfere with the possession thereof and the possession of said sheriff aforesaid ever since, and an order having been duly
21 issued by sais court on the 25th day of November, 1893, whereby the said Amel J. Pepke was ordered to appear before Charles F. Templeton, judge of said court, on the 5th day of December, 1893, at ten o'clock in the forenoon, to show cause why he should not be punished for interfering with the possession of said premises as in contempt, and that a copy of said order and of said affidavit was duly served upon said Amel J. Pepke, and on said 5th day of December, 1893, the said Emil J. Pepke appeared before said court in person and by his attorneys, M. A. Spooner and W. B. Hauswer, and it appearing to the satisfaction of the court that the said Emil J. Pepke did, on or about the 25th day of October, 1893, *broke* into a building upon the said premises and take possession thereof and has continued to interfere with the possession of said sheriff under said injunctional order aforesaid since the 25th day of October, 1893: Now, therefore, on motion of James H. Bosard, assistant attorney general in and for the county of Walsh, State of North Dakota, it is hereby ordered, adjudged, and decreed that the said Emil J. Pepke be, and he is hereby, adjudged guilty of contempt.

It is further ordered, adjudged, and decreed that the said Emil J. Pepke be punished for such contempt by imprisonment in the county jail, in the county of Walsh aforesaid, for the period of ninety days, commencing at the hour of noon today, and that he

pay a fine of two hundred dollars, or, in default thereof, that he be imprisoned in such jail for the additional period of not to exceed two days.

Dated this 5th day of December, 1893.

By the court:

CHARLES F. TEMPLETON, *Judge.*

EXHIBIT I.

STATE OF NORTH DAKOTA, }
County of Walsh. }

In District Court, First Judicial District.

STATE OF NORTH DAKOTA *ex Rel.* WM. H. STANDISH, Attorney General, Plaintiff,
v.
CHARLES TEDFORD and J. C. OSWALD, Defendants.

The State of North Dakota to the sheriff of Walsh county, said State, Greeting:

You, the said sheriff, are hereby commanded to keep the
22 body of said Emil J. Pepke, now in your custody, who was on the 5th day of December, 1893, duly adjudged by the judge of said court to be guilty of contempt for interfering with the possession of that certain building on lot ten, block thirty, of the city of Grafton, which was taken into your possession on the 12th day of July, 1893, under and by virtue of an injunctional order issued in an action then pending, wherein The State of North Dakota *ex rel.* William H. Standish, attorney general, was plaintiff and Charles Tedford and J. C. Oswald were defendants, and who was on said 5th day of December, 1893, sentenced to be confined and imprisoned in the county jail of Walsh county for and during the period of ninety days from 12 o'clock noon of said 5th day of December, 1893, and to pay a fine of two hundred dollars and to stand committed until said fine shall be paid, not exceeding over two days for said fine or one day for each hundred dollars of said fine, or until he shall be discharged therefrom by due course of law.

Dated this 5th day of December, A. D. 1893.

CHARLES F. TEMPLETON, *Judge.*

Upon the back of said petition appear endorsements in words and figures following, to wit:

Case No. 15. In the dist. court of the U. S. for the dist. of North Dakota. *In re* Emil J. Pepke. Petition for writ of *habeas corpus.* Upon the filing of the within petition let a writ of *habeas corpus* in the usual form issue as prayed for, returnable before me Dec. 14th, 1893, at 10 a. m., at my chambers. Alfred D. Thomas, U. S. di't judge, dist. of North Dakota. Filed Dec. 9, 1893. J. A. Montgomery, clerk, by H. G. Edwards, deputy. Spooner & Taylor, att'ys for petitioner.

Thereupon, afterwards, to wit, on the said 9th day of December, 1893, a writ of *habeas corpus* was issued in said matter; which said writ was in words and figures following, to wit:

UNITED STATES OF AMERICA,)
District of North Dakota.)

United States District Court.

The President of the United States of America to J. E. Cronan, sheriff of Walsh county, North Dakota, Greeting:

We command you that you have the body of Emil J. Pepke, by you imprisoned and detained, as it is said, together with the term and cause of such imprisonment and detention, by whatso-
23 ever name the said Emil J. Pepke shall be called or charged, before the Honorable Alfred D. Thomas, judge of the district court of the United States for the district of North Dakota, at the chambers of the said Honorable Alfred D. Thomas, in the court-house of Cass county, at Fargo, in said district, on the 14th day of December, A. D. 1893, at ten o'clock a. m., to do and to receive what shall then and there be considered concerning said Emil J. Pepke; and have you then and there this writ.

Witness the Honorable Alfred D. Thomas, judge of the district court of the United States for said district, at Fargo, in said district, this 9th day of December, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] J. A. MONTGOMERY, *Clerk.*

SPOONER & TAYLOR,
Attorneys for Petitioner.

Upon the back of said writ appear endorsements in words and figures following, to wit:

DISTRICT OF NORTH DAKOTA, *ss:*

I hereby certify and return that I served the within writ of *habeas corpus* on the therein-named J. E. Cronan, sheriff of Walsh county, North Dakota, by handing to and leaving with him personally a certified copy thereof, at Fargo, in said district, on the 9th day of December, 1893.

A. F. PRICE,
U. S. Marshal,
By O. G. BARNES, *Deputy.*

Marshal's Fees.

Service	2
2 miles	12
	$2 12

Case No. 15. United States of America *ex rel.* Emil J. Pepke *vs.* J. E. Cronan, as sheriff. Writ of *habeas corpus.* Filed Jan. 11, 1894. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

Thereupon, afterwards, to wit, on the 14th day of December, 1893, a motion to dismiss the writ of *habeas corpus* was filed in said matter; which said motion is in words and figures following, to wit:

In the District Court of the United States for the District of North Dakota.

In the Matter of the Petition of EMIL J. PEPKE
vs.
J. E. CRONAN, as Sheriff of the County of Walsh, in the State of North Dakota.

24 Said J. E. Cronan, as said sheriff, saves and reserves to himself all questions of the jurisdiction of said court herein and, not wishing to consent to its jurisdiction herein, *and* moves the court to dismiss the said application for these reasons:

First. The court has no jurisdiction thereof for the reason that it does not appear that it is a civil suit involving over the sum of $2,000; that it does not appear that said petitioner is a non-resident of the State of North Dakota, nor does it involve the violation of any criminal law or statute enacted by Congress, nor does it come into this court by any process of removal of a case from a State court under any United States statutes, nor is there any mode of appeal authorized to start an original suit in this court to review a decree of a State court of co-ordinate jurisdiction and for other causes apparent on the record.

W. H. STANDISH,
As Att'y Gen'l of N. D., Att'y for said J. E. Cronan, as Sheriff.

On the back of said notice to dismiss appear endorsements in words and figures following, to wit:

Case No. 15. United States of America *ex rel.* Emil J. Pepke *vs.* J. E. Cronan, as sheriff. Motion to dismiss writ of *habeas corpus.* Filed Dec. 14, 1893. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

Thereupon, afterwards, to wit, on the said 14th day of December, 1893, a return to the writ of *habeas corpus* was filed in said matter; which said return is in words and figures following, to wit:

In the District Court of the United States for the District of North Dakota.

In the Matter of the Petition of EMIL J. PEPKE.
vs.
J. E. CRONAN, as Sheriff of Walsh County, North Dakota.

Whereas the petition for a writ of *habeas corpus* for release from imprisonment therein described —, the said J. E. Cronan, as sheriff, now comes and for return thereto says that he has the body of said Emil J. Pepke in court, and that he holds him by reason of a writ of commitment, a copy of which is set out in the petition of said

Emil J. Pepke herein, and which is duly signed and tested by the genuine signature of Charles F. Templeton, a judge of the district court of the first judicial district of the State of North Dakota, the same having been granted in certain proceedings set out in the petition herein.

Witness my hand and seal hereto this 14th day of December, A. D. 1893.

J. E. CRONAN,
Sheriff, Walsh County.

25 On the back of said return appear endorsements in words and figures following, to wit:

Case No. 15. United States of America *ex rel.* Emil J. Pe*kpe vs.* J. E. Cronan, as sheriff. Return to writ of *habeas corpus.* Filed Dec. 14, 1893. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

Thereupon, afterwards, to wit, on the said 14th day of December, a stipulation was filed in said matter; which said stipulation is in words and figures following, to wit:

District Court of the United States for the District of North Dakota.

In the Matter of the Petition of EMIL J. PEPKE for His Discharge on *Habeas Corpus.*

It is stipulated by and between the attorneys for Emil J. Pepke, on the one part, and the attorney general of the State of North Dakota, on the other, that any and all of the statutes of the State of North Dakota perti-ent to the matters in issue upon the petition and return in this proceeding may be read and referred to upon the argument and consideration of the issues therein as fully from the printed copies in ordinary use in said district as if specially referred to or set out in the pleadings and proven in due form before said court.

Dated December 14th, 1893.

SPOONER & TAYLOR,
Attorneys for Petitioner, Emil J. Pepke.
WM. H. STANDISH,
Attorney General of the State of North Dakota.

Upon the back of said stipulation appear endorsements in words and figures following, to wit:

Case No. 15. U. S. dist. court. United States *ex rel.* Emil J. Pepke *vs.* J. E. Cronan, as sheriff, etc. Stipulation as to statutes of N. D. Filed Dec. 14, 1893. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

26 Thereupon, afterwards, to wit, on the said 14th day of December, 1893, the following proceedings were had in said matter, as appear of record on page 701 of the Journal of said court:

THE UNITED STATES *ex Rel.* EMIL J. PEPKE
vs.
JOSEPH E. CRONAN, as Sheriff of Walsh County, North Dakota.

Comes now the defendant, Joseph E. Cronan, sheriff of Walsh county, North Dakota, and makes return to the writ of *habeas corpus* heretofore issued herein with the body of said Emil J. Pepke in his custody at the bar of the court; and now comes said petitioner, by his attorney, M. A. Spooner, Esq., and the defendant, with his attorneys, W. H. Standish, Esq., the attorney general of the State of North Dakota, and Charles A. Pollock, Esq., and, after hearing the arguments of the respective counsel, the court continues the hearing until tomorrow morning at 10 o'clock.

Thereupon, afterwards, to wit, on the 15th day of December, 1893, the following proceedings were had in said matter, as appear of record on page 702 of the Journal of said court:

THE UNITED STATES OF AMERICA *ex Rel.* EMIL J. PEPKE
vs.
JOSEPH E. CRONAN, as Sheriff of Walsh County, North Dakota.

Come now the parties, by their respective counsel, and this matter is duly argued and submitted to the court.

Thereupon, afterwards, to wit, on the 22d day of December, 1893, the following proceedings were had in said matter, as appear of record on page 707 of the Journal of said court:

THE UNITED STATES OF AMERICA *ex Rel.* EMIL J. PEPKE
vs.
J. E. CRONAN, as Sheriff of Walsh County, North Dakota.

This matter having been duly argued and submitted to the court, now, after due consideration, it is ordered that the writ of
27 *habeas corpus* herein be, and the same hereby is, discharged, and the petitioner is remanded to the custody of the defendant, the sheriff of Walsh county, North Dakota.

Thereupon, afterwards, to wit, on the said 22d day of December, 1893, a memorandum of opinion was filed in said matter; which said memorandum is in words and figures following, to wit:

THE UNITED STATES OF AMERICA *ex Rel.* EMIL J. PEPKE
vs.
JOSEPH E. CRONAN, as Sheriff of Walsh County, North Dakota.

Memorandum. In Re Habeas Corpus.

Both parties have presented this case upon the merits, the facts set forth in the petition being conceded by the attorney general for the State. It was not claimed or suggested upon the argument that the court ought to refuse to entertain the case for the reason that there were no special circumstances alleged calling for the interpo-

sition of this court by virtue of this writ. It seemed to be conceded that there were such circumstances, and I therefore have considered the case on the merits and have reached the conclusion, after a careful examination of all of the cases cited, that the district court of the State had jurisdiction to make the orders in question, and that the prisoner is not held or restrained of his liberty in violation of the Constitution or any laws of the United States.

It is therefore ordered that the prisoner be remanded and the writ discharged.

On the back of said memorandum appear endorsements in words and figures following, to wit:

Case No. 15. United States *ex rel.* Emil J. Pepke *vs.* J. E. Cronan, as sheriff of Walsh county. Memorandum of opinion. Filed Dec. 22, 1893. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

Thereupon, afterwards, to wit, on the 18th day of January, 1894, assignment of errors was filed in said matter; which said assignment of errors is in words and figures following, to wit:

District Court of the United States for the District of North Dakota.

28 In the Matter of the Petition of EMIL J. PEPKE for His Discharge on *Habeas Corpus*.

Assignment of Errors.

Now comes Emil J. Pepke, the petitioner above named, by Spooner & Taylor, his attorneys, and files in this court an assignment of errors in the final order and judgment of said court denying his application to be discharged, as follows:

1. The said district court erred in holding and adjudging that his imprisonment was not contrary to law and in violation of the Constitution of the United States.

2. The said district court erred in holding and adjudging that said Emil J. Pepke was not entitled to his liberty.

3. The said district court erred in denying the application of the said Emil J. Pepke for his discharge.

4. The said district court erred in holding that chapter 110 of the laws passed at the first session of the Legislative Assembly of the State of North Dakota, being the laws of the year 1890, is not unconstitutional and invalid under article 14 of the amendments to the Constitution of the United States of America.

5. The said district court erred in holding that section 13 of chapter 110 of the general laws of the State of North Dakota for the year 1890, being section 13 of chapter 110 of the laws of the first session of the Legislative Assembly of the State of North Dakota, is not void and unconstitutional under article 14 of the amendments to the Constitution of the United States of America.

6. The said district court erred in overruling the contention of said petitioner that those portions of the said section 13 of chapter 110 of the laws of 1890 of the State of North Dakota which provide

that an injunctional order may be issued by any district court of the State of North Dakota upon an affidavit or complaint or both of the State's attorney, attorney general or his assistant, upon information and belief, and those provisions of said section which provide that if an affidavit be presented to the court or judge stating or showing that intoxicating liquor is sold, bartered, or given away on certain premises the court or judge must at the time of granting the injunction issue his warrant commanding the officer serving the writ at the time of such service to diligently search the premises, and if such officer upon such search shall find upon such premises any liquors of any kind he shall take and hold possession of such premises and keep the same closed until such final judgment; also those portions of said section which provide
29 that leasehold premises may be taken and closed in the manner aforesaid, regardless of any guilty intent or knowledge on the part of the lessor; also those portions of said section which provide that the owner of the premises, in case the same are leased, must pay all costs and prepare and file a bond, with sureties, conditioned that he will immediately abate any nuisance upon said premises and prevent the same from being established or kept thereon within the period of one year thereafter before he can secure a return of such property, regardless of the guilt or innocence of said owner; also those portions of said section which provide for depriving a lessor of his property in the absence of any provision for making him a party to the action or giving him his day in court, are each and all unconstitutional and void, as contravening the provisions of article XIV of the amendments to the Constitution of the United States.

7. The said district court erred in overruling the contention of said petitioner that said chapter 110 of the laws of 1890 of the State of North Dakota, and particularly section 13 thereof, conferred no authority upon the district court of the State of North Dakota to issue and make its order closing the building and premises in question, with the disobedience of which order the petitioner was charged, and upon which the said contempt proceedings were founded and based.

9. The said district court erred in overruling the contention of the petitioner that the said petitioner was by reason of such order and judgment committing him for comtempt by the said district court deprived of his liberty without due process of law.

Wherefore the said Emil J. Pepke prays that the said order and judgment of said district court made and dated December 22d, 1893, denying and refusing his application for a discharge, may be in all things reversed and he discharged from imprisonment.

Dated January 18, 1894.

SPOONER & TAYLOR,
Attorneys for Petitioner.

Upon the back of said assignment of errors appear endorsements in words and figures following, to wit:

Case No. 15. U. S. dist. court. United States *ex rel.* Emil J.

Pepke *vs.* J. E. Cronan, as sheriff. Assignment of errors. Filed Jan. 18, 1894. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

30 Thereupon, afterwards, to wit, on the said 18th day of January, 1894, a petition for appeal was filed in said matter; which said petition was in words and figures following, to wit:

District Court of the United States for the District of North Dakota.

In the Matter of the Petition of EMIL J. PEPKE for His Discharge on *Habeas Corpus*.

Application for his discharge having been denied, now comes Emil J. Pepke, the petitioner above named, by Spooner & Taylor, his attorneys, and in open court prays an appeal to the Supreme Court of the United States from the judgment and determination of this court denying his petition for his discharge.

Dated January 18, 1894.

SPOONER & TAYLOR,
Attorneys for Petitioner.

Upon the back of said petition for appeal appear endorsements in words and figures following, to wit:

Case No. 15. U. S. dist. court. United States *ex rel.* Emil J. Pepke *vs.* J. E. Cronan, as sheriff, etc. Petition for appeal. Filed Jan. 18, 1894. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

Thereupon, afterwards, to wit, on the said 18th day of January, 1894, an order allowing appeal was filed in said case; which said order is in words and figures following, to wit:

31 District Court of the United States for the District of North Dakota.

In the Matter of the Petition of EMIL J. PEPKE for His Discharge on *Habeas Corpus*.

The application of Emil J. Pepke for his discharge having been refused by this court, and he having thereupon prayed this day in open court that an appeal be allowed to the Supreme Court of the United States from the said judgment and determination of this court, on motion of Spooner & Taylor, attorneys for the petitioner, and after hearing Hon. William H. Standish, attorney general of the State of North Dakota, and Hon. C. A. Pollock, assistant attorney general of the State of North Dakota, it is—

Ordered that such appeal be, and the same is hereby, allowed; and it is—

Ordered that the clerk of the United States district court for the district of North Dakota do send up to the Supreme Court of the United States a transcript of the petition, writ of *habeas corpus*, return thereon, and all other records, files, minutes, and proceedings in this matter.

It is further ordered that the said Pepke furnish or cause to be furnished and filed an undertaking in his behalf in the sum of two hundred dollars ($200.00) to be approved by the undersigned, conditioned that the said petitioner shall pay all costs that may be awarded against him on account of said appeal should the judgment be affirmed; and it is further—

Ordered that the orders and judgments heretofore had in this cause remanding said Pepke to the custody of said Cronan and all orders and judgments and commitments heretofore made and entered in and issued from the State court, referred to in the petition herein, be, and the same are hereby, superseded until a final decision of the Supreme Court can be had in the case upon the filing of an undertaking in the sum of five hundred dollars ($500.00) by or on behalf of said Pepke, with surety to be approved by the undersigned, conditioned for his appearance to answer said judgment.

Dated January 18th, 1894.

ALFRED D. THOMAS, *Judge.*

32 Upon the back of said order appear endorsements in words and figures following, to wit:

Case No. 15. U. S. dist. court. United States *ex rel.* Emil J. Pepke *vs.* J. E. Cronan, as sheriff, etc. Order allowing appeal. Filed Jan. 18, 1894. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

Thereupon, afterwards, to wit, on said 18th day of January, 1894, a bond on appeal was filed in said case; which said bond is in words and figures following, to wit:

District Court of the United States for the District of North Dakota.

In the Matter of the Petition of EMIL J. PEPKE for His Discharge on *Habeas Corpus.*

Whereas the petitioner in the above-entitled cause and proceeding has duly applied for an appeal to the Supreme Court of the United States of America from the judgment of said district court entered in said cause and proceeding on the 22d day of December, 1893, denying his petition for discharge from imprisonment and discharging the said application; and

Whereas said petitioner's prayer for an appeal has been allowed and said appeal is by said petitioner about to be perfected:

Now, therefore, we, Alex. Stern and Harry O'Neil, of Fargo, North Dakota, residents and freeholders of said district of North Dakota, do hereby undertake, promise, and agree that if the respondent herein, The State of North Dakota, recover judgment in said action or the judgment so appealed from is affirmed that the said petitioner shall pay all costs that may be awarded against him on account of said appeal, not exceeding in the aggregate the sum of two hundred dollars ($200.00), which is the penalty of this undertaking.

In testimony whereof we have hereunto set our hands and seals this 17th day of January, 1894.

ALEX. STERN. [SEAL.]
HARRY O'NEIL. [SEAL.]

Signed, sealed, and delivered in presence of—
ABE KAUFMAN.
LOUIS ADELSOHN.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

33 Be it known that on this 17th day of January, 1894, before me personally appeared Alex. Stern and Harry O'Neill, to me well known to be the same persons described in and who executed the foregoing instrument, and duly acknowledged that they executed the same.

H. G. EDWARDS,
[SEAL.] *Deputy Clerk, U. S. District Court, North Dakota.*

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Alex. Stern and Harry O'Neil came before me personally, and, being first duly sworn, each for himself doth depose and say that he is a resident and freeholder of the State of North Dakota and worth the sum of four hundred dollars ($400.00) over and above his debts and liabilities and property exempt from execution.

ALEX. STERN.
HARRY O'NEIL.

Subscribed and sworn to before me this 17th day of January, A. D. 1894.

H. G. EDWARDS,
[SEAL.] *Deputy Clerk, U. S. District Court, North Dakota.*

On the back of said bond appear endorsements in words and figures following, to wit:

The within undertaking and the sureties thereon are by me approved this 18th day of January, 1894. Alfred D. Thomas, judge U. S. dist. court, dist. North Dakota. Case No. 15. U. S. dist. court. United States *ex rel.* Emil J. Pepke *vs.* J. E. Cronan, as sheriff, et-. Bond for costs. Filed Jan. 18, 1894. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

Thereupon, afterwards, to wit, on the 18th day of January, 1894, a supersedeas bond was filed in said matter; which said supersedeas bond is in words and figures following, to wit:

34 District Court of the United States for the District of North Dakota.

In the Matter of the Petition of EMIL J. PEPKE for Discharge on *Habeas Corpus.*

Whereas the petitioner above named has duly applied to the said district court and the judge thereof for a writ of *habeas corpus*, praying and asking a release from imprisonment by the sheriff of Walsh county, in the State of North Dakota; and

Whereas, at a general term of said district court of the United States for the district of North Dakota, the judgment of said court was made and entered on the 22d day of December, 1893, denying the petition of said Pepke for his release and discharge and remanding him to the custody of said sheriff of Walsh county; and

Whereas afterwards, in open court, at the said general term of said district court, the said petitioner prayed an appeal from the judgment of said district court of the United States to the Supreme Court of the United States, which said appeal has been allowed; and

Whereas the said district court of the United States has made and entered its order superseding the said judgment of the said district court of the United States, and the order, judgment, and commitment of the district court of the State of North Dakota under which the said Pepke remains imprisoned, pending said appeal and until the final decision of the Supreme Court of the United States can be had in the case, upon the furnishing and filing in behalf of said Pepke of an undertaking on appeal in the sum of five hundred dollars, conditioned for his appearance to answer said judgment:

Now, therefore, we, Alex. Stern, of Fargo, North Dakota, and Harry O'Neill, of Fargo, North Dakota, do hereby undertake, promise, and agree that if said judgment so appealed from shall be affirmed we and each of us shall produce the said Emil J. Pepke and his body to answer whatever decision the Supreme Court may render in the cause relative to the body of the said Emil J. Pepke, our obligation hereunder in no event to exceed the sum of five hundred dollars ($500.00), which is the penalty of this undertaking.

In testimony whereof we have hereunto set our hands and seals this 17th day of January, 1894.

ALEX. STERN. [SEAL.]
HARRY O'NEILL. [SEAL.]

35 Signed, sealed, and delivered in presence of—
ABE KAUFMAN.
LOUIS ADELSOHN.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Be it known that on this 17th day of January, 1894, personally before me appeared Alex. Stern and Harry O'Neill, to me well

known to be the same persons described in and who executed the foregoing instrument, and duly acknowledged that they executed the same.

H. G. EDWARDS,
Deputy Clerk, U. S. District Court, North Dakota.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

Alex. Stern and Harry O'Neill came personally before me, and, being first duly sworn, each for himself doth depose and say tha-he is a resident and freeholder of the State of North Dakota and worth the sum of one thousand dollars ($1,000.00) over and above his debts and liabilities and property exempt from execution.

ALEX. STERN.
HARRY O'NEILL.

Subscribed and sworn to before me this 17 day of January, 1894.

H. G. EDWARDS,
Deputy Clerk, U. S. Dist. Court, North Dakota.

Endorsed: The within undertaking and the sureties thereon are by me approved this 18th day of January, 1894. Alfred D. Thomas, judge U. S. dist. court, dist. North Dakota.

On filing the within undertaking approved by me the clerk will issue his certificate directed to the sheriff of Walsh county, North Dakota, reciting the orders made in the within-entitled proceeding relating to the superseding of previous orders and judgments of this court and of the State court referred to in the petition pending the appeal and providing for the release of said Pepke pending such appeal.

Dated Jan'y 18, 1894.

ALFRED D. THOMAS,
Judge U. S. Dist. Court, Dist. North Dakota.

36 Case No. 15. U. S. dist. court. United States *ex rel.* Emil J. Pepke -*s.* J. E. Cronan, as sheriff, etc. Supersedeas bond and order. Filed Jan. 18, 1894. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

Thereupon, afterwards, to wit, on the 20th day of January, 1894, a notice of appeal was filed in said case; which said notice is in words and figures following, to wit:

District Court of the United States for the District of North Dakota.

In the Matter of the Petition of EMIL J. PEPKE for His Discharge on *Habeas Corpus.*

SIRS: Please take notice that Emil J. Pepke, the petitioner above named, appeals to the Supreme Court of the United States of America from the judgment and determination of the said district court

made and entered December 22d, 1893, in the above-entitled proceeding denying his petition for discharge from imprisonment.

Dated January 18th, 1894.

SPOONER & TAYLOR,
Attorneys for Petitioner.

To Hon. Wm. H. Standish, attorney general State of North Dakota, and Hon. Charles A. Pollock, assistant attorney general State of North Dakota.

Due service of the above notice of appeal at Bismarck, North Dakota, is admitted this 19th day of January, 1894.

WM. H. STANDISH,
Attorney General State of North Dakota.

Upon the back of said notice appear endorsements in words and figures following, to wit:

Case No. 15. U. S. dist. court. United States *ex rel.* Emil J. Pepke *vs.* J. E. Cronan, as sheriff. Notice of appeal. Filed Jan. 20, 1894. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

37 Thereupon, afterwards, to wit, on the said 20th day of January, 1894, a stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

District Court of the United States for the District of North Dakota.

In the Matter of the Petition of EMIL J. PEPKE for His Discharge on *Habeas Corpus.*

It is stipulated by and between the attorneys for the petitioner and the attorneys for the State of North Dakota in the above-entitled proceeding that the notice of appeal by the said petitioner, Emil J. Pepke, from the order and final determination of this court, refusing his application for discharge, has been this day, at Bismarck, in said State of North Dakota, in said district, duly and personally served, and that the issuance and service of any citation herein is hereby waived.

Dated January 19th, 1894.

SPOONER & TAYLOR,
Attorneys for Petitioner.
WM. H. STANDISH,
Attorney General State of North Dakota.

Upon the back of said stipulation appear endorsements in words and figures following, to wit:

Case No. 15. U. S. dist. court. The United States *ex rel.* Emil J. Pepke *vs.* J. E. Cronan, as sheriff, etc. Stipulation waiving citation. Filed Jan. 20, 1894. J. A. Montgomery, clerk, by H. G. Edwards, deputy.

38 UNITED STATES OF AMERICA, }
District of North Dakota, } *ss:*

I, J. A. Montgomery, clerk of the district court of the United States for the district of North Dakota, do hereby certify that the foregoing pages from one (1) to thirty-seven (37), inclusive, contain true and faithful transcripts of all pleadings, process, and proceedings of record and on file in my office as said clerk and of the whole thereof and the endorsements thereon in the matter of The United States of America *ex rel.* Emil J. Pepke *vs.* Joseph E. Cronan, as sheriff of Walsh county, North Dakota, in the matter of the petition of Emil J. Pepke for his discharge on writ of *habeas corpus.*

Seal United States District Court, North Dakota.

Witness my hand and the seal of said district court of the United States for the district of North Dakota, at Fargo, in said district, this 30th day of January, A. D. 1894.

J. A. MONTGOMERY, *Clerk,*
By H. G. EDWARDS, *Deputy.*

[Endorsed:] United States district court, district of North Dakota. In the matter of the petition of Emil J. Pepke for his discharge on *habeas corpus.* Transcript on appeal.

Endorsed on cover: Case No. 15,506. North Dakota D. C. U. S. Term No., 1122. Emil J. Pepke, appellant, *vs.* Joseph E. Cronan, as sheriff of Walsh county, North Dakota. Filed February 12th, 1894.

NO. [illegible]

Supreme Court of the United States.

October Term, 1899.

EMIL J. PEPKE,

Appellant,

vs.

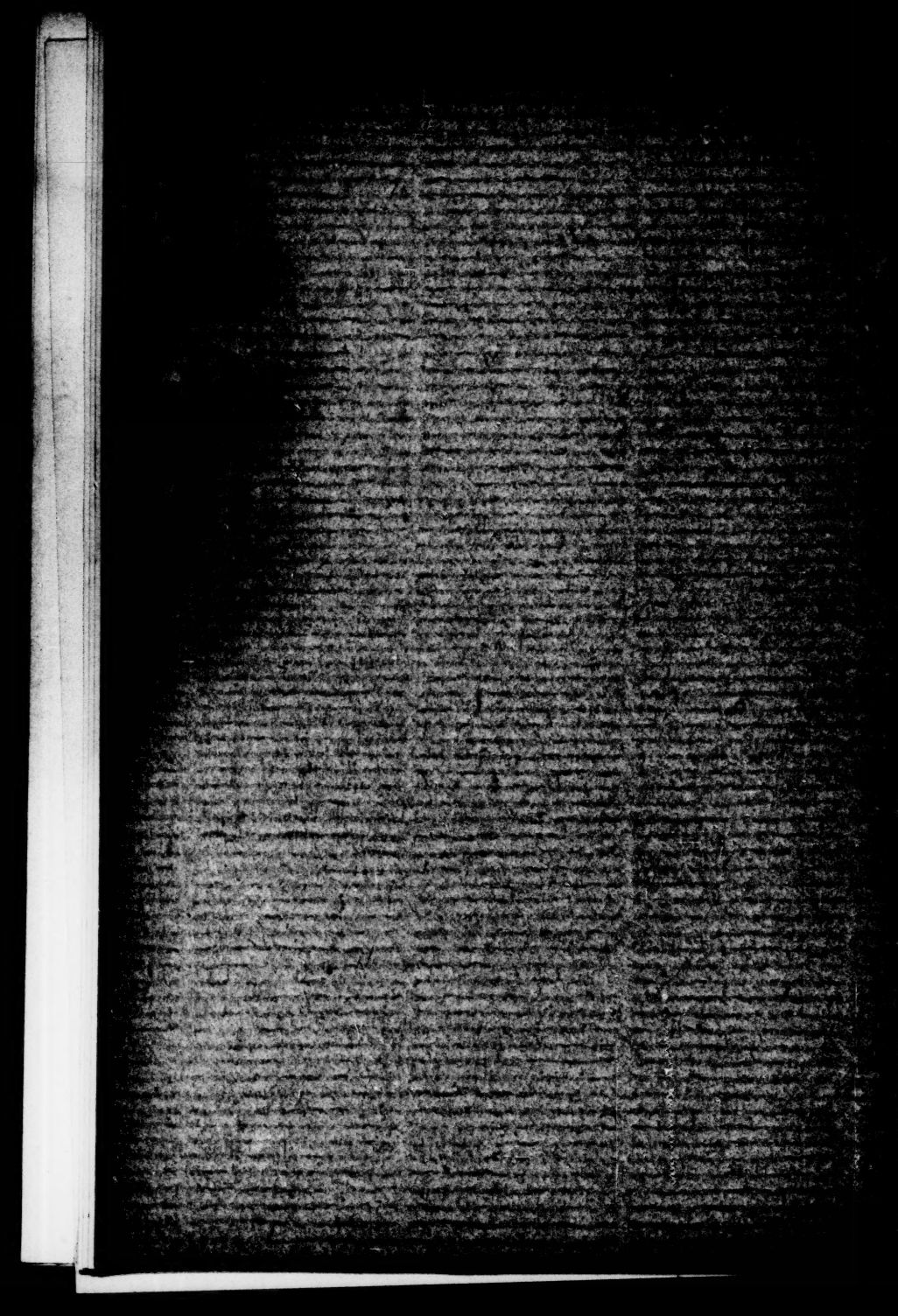
JOSEPH E. CRONAN, as Sheriff of Walsh County, North Dakota.

BRIEF.

MARSHALL A. SPOONER AND ARMSTRONG TAYLOR,

Counsel for Appellant.

MINNEAPOLIS:
MILLER PRINTING CO.
1899.



NO. 1122.

Supreme Court of the United States.

October Term, 1893.

EMIL J. PEPKE,

Appellant,

vs.

JOSEPH E. CRONAN, as Sheriff of Walsh County, North Dakota.

BRIEF.

MARSHALL A. SPOONER AND ARMSTRONG TAYLOR,

Counsel for Appellant.

MINNEAPOLIS.
MILLER PRINTING CO.
1894.

EMIL J. PEPKE, Plaintiff,
vs.
JOSEPH E. CRONAN, as Sheriff of Walsh County, North Dakota.

No. 1122.
Supreme Court of the United States, October Term, 1893.

STATEMENT OF THE CASE.

John C. Oswald and Theo. Basting, long prior to February 1st, 1893, while then both residing in Minneapolis, state of Minnesota, became the owners of lot ten (10), in block thirty (30), in Grafton, Walsh county, state of North Dakota, together with all buildings and improvements thereon. They have ever since continued to remain the owners of such lot and buildings. For more than fifteen years they have been residents and citizens of the state of Minnesota, and have never been residents or citizens of the state of North Dakota. On the first day of February, 1893, they leased the premises referred to to one John Murdock, which lease was in writing, and a copy of the lease is attached to the petition of appellant; such lease provided, among other things, the following: "that said lessee will not keep or allow any liquors or beverages of an intoxicating nature, or tendency to be sold, kept, or tolerated on said premises, nor any gambling or immoral practices." (Folio 8, record.)

Afterwards and during the pendency of said lease an action and proceeding upon the information of one F. E. Johnson was commenced and instituted, in the district court of Walsh county, North Dakota, in the name of the attorney-general of the said state, against one Charles Tedford, who had come into possession of the said property under said lessee without the knowledge of the said Oswald and Basting, which action was also against the said John C. Oswald by name, in which action and proceeding an injunction was prayed for against the said Tedford and the said Oswald enjoining the said Tedford from unlawfully disposing of intoxicating liquors upon said premises, and the said Oswald from allowing or permitting the use of said premises for the unlawful keeping or selling of intoxicating liquors. (Folios 10-12 inclusive, record.) Neither the said Oswald nor the said Basting ever consented to the use of said premises for the sale or disposition

of liquors, nor were they aware that the premises were or had been in any manner used for such purposes. This was conceded to be true. Upon such petition, which was sworn to only upon information and belief of one F. E. Johnson, the district court for the first judicial district of North Dakota, issued its injunctional order enjoining and restraining the said Tedford and the said Oswald until the further order of said court, from using or permitting such premises to be used as a place for the sale of intoxicating liquors, or as a place for keeping for sale intoxicating liquors, and from permitting intoxicating liquors to be drunk upon said premises and from using any such liquors upon said premises. (Folio 15, record.) Upon an affidavit of the said Johnson, made and presented at the same time such petition was presented, showing and stating that on the 14th day of May, 1893, the said Johnson bought from the said Tedford whiskey to be drunk as a beverage upon said premises, the said court issued a search warrant, directed to the sheriff of said Walsh county, commanding him to search the said premises, and, if upon such search said sheriff should find upon said premises any intoxicating liquors of any kind, to take such liquors into his, said sheriff's possession; and the said search warrant further commanded said sheriff to take and hold possession of the said premises and keep the same closed until final judgment in said action. (Folio 17, record.) The sheriff of said Walsh county, to whom said search warrant was addressed and directed, did search the said premises and made his return upon such search warrant to the effect that he had found upon said premises and taken into his possession certain intoxicating liquors particularly described in such return. (Folio 13, record.) At the same time, as a part of his return, the said sheriff certified and returned that he took into his actual possession the wooden buildings on said premises, together with the personal property therein; further certifying and returning "all of which I now actually hold subject to the order of said court." The sheriff's return was made on July 20th, 1893. (Folio 13, record.) The said sheriff securely closed the buildings on said premises by lock and key, and continued to hold such premises securely closed until the 25th day of October, 1893, when this appellant, with the full consent and under the license and permission of the owners of said building, said John C. Oswald and Theo. Basting, by means of a key fitted to the lock on said building, peaceably entered the same. No notice of any character had been placed on or about said

premises of the fact that the said sheriff was holding the same, nor was there anything in or about said premises to indicate that the same were closed or held under any order of any court. No effort was ever made to serve any process in said action or proceeding upon either the said Oswald or the said Basting, nor is it claimed that any attempt at such service was ever made. The sheriff of said county, on the 20th day of November, 1893, made report to the said district court of the fact that appellant had entered the said premises, (Folio 18, record), and on the 25th day of November, 1893, the said district court issued its order to the said appellant to appear and show cause before said court, on the 5th day of December, 1893, why he should not be punished for contempt of the order of said court in so entering upon said premises. (Folio 19, record.) To such order to appear and show cause this appellant, on the 5th day of December, 1893, made his answer and return setting up the fact that he had made such entry with the consent and permission of the owners of said premises, John C. Oswald and Theo. Basting, and stating that the entry upon such premises was peaceable; and further stating and showing that never since his entry upon said premises had there been any liquors of any kind or character on or about said premises, and that the same had not in any manner been used for or devoted to any purpose contrary to law. (Folio 20, record.) Notwithstanding such return, which was admitted by the state to be true, this appellant was adjudged and decreed to be guilty of contempt and was sentenced for such contempt to imprisonment in the county jail of said Walsh county, for the period of ninety days, and that he pay a fine of two hundred dollars, or, in default thereof, that he be imprisoned in such jail for the additional period of not to exceed two days. (Folio 21, record.) Upon the sentence and judgment of said court so passed, and in pursuance of the same, a commitment was issued by said court to the said sheriff of said Walsh county commanding him to execute the said sentence and judgment and to take and keep the body of appellant in the county jail of Walsh county in accordance with the terms of such sentence and judgment. (Folio 22, record.) The said sheriff of said Walsh county executed the said sentence and under said commitment did take appellant and imprisoned and detained him and confined him in such county jail. All the proceedings in the said district court of North Dakota from the inception of the action and proceeding for an in-

junction and up to and including the imprisonment of the appellant in the county jail under the commitment issued upon the sentence adjudging him in contempt, were had under section 13, of chapter 110, of the laws of North Dakota of the year 1890, which said chapter is known as the prohibition law of said state. Appellant then petitioned the district court of the United States for the district of North Dakota for a writ of *habeas corpus* to bring appellant before said court to inquire into the cause of his detention. Upon the filing of such petition a writ was directed to issue and the sheriff of said Walsh county, for whom appeared the attorney-general of the state of North Dakota, made return to said writ, and as and for return set forth that the said district court had "no jurisdiction thereof for the reason that it does not appear that it is a civil suit involving over the sum of $2,000; that it does not appear that said petitioner is a non-resident of the State of North Dakota, nor does it involve the violation of any criminal law or statute enacted by congress, nor does it come into this court by any process of removal of a case from a state court under any United States statutes, nor is there any mode of appeal authorized to start an original suit in this court to review a decree of a state court of co-ordinate jurisdiction and for other causes apparent on the record." (Folio 24, record.)

In his petition appellant set forth all the facts hereinbefore stated and contended and set forth that the said district court of the state of North Dakota had no jurisdiction to make any of the orders or to enter any of the judgments hereinbefore referred to, either in so far as they ordered and directed the sheriff of said county to close the said buildings, or in holding and adjudging appellant in contempt, or otherwise because the section and chapter of the laws of North Dakota referred to were and are void and unconstitutional under article XIV of the amendments to the constitution of the United States. (Folio 5, record.)

Upon the hearing all the facts set forth in the petition were conceded by the attorney-general to be true. (Folio 27, record.)

The matter was heard and determined upon the merits. The district court in discharging the writ of *habeas corpus* and in remanding the petitioner to the custody of the sheriff of Walsh county, North Dakota, filed and entered its memorandum as a part of its order and judgment in the following words: "It was not claimed or suggested upon the argument

that the court ought to refuse to entertain the case for the reason that there were no special circumstances alleged calling for the interposition of this court by virtue of this writ. It seemed to be conceded that there were such circumstances, and I therefore have considered the case on the merits and have reached the conclusion, after a careful examination of all the cases cited, that the district court of the state had jurisdiction to make the orders in question, and that the prisoner is not held or restrained of his liberty in violation of the constitution or any laws of the United States." (Folio 27, record.)

From the judgment of the said district court discharging the said writ of *habeas corpus* and remanding the petitioner to the custody of the sheriff of Walsh county, of North Dakota, this appeal is taken.

ASSIGNMENT OF ERRORS.

1. The said district court erred in holding and adjudging that appellant's imprisonment was not contrary to law and in violation of the constitution of the United States.

2. The said district court erred in holding and adjudging that said Emil J. Pepke was not entitled to his liberty.

3. The said district court erred in denying the application of the said Emil J. Pepke for his discharge.

4. The said district court erred in holding that chapter 110 of the laws passed at the first session of the legislative assembly of the state of North Dakota, being the laws of the year 1890, is not unconstitutional and invalid under article XIV of the amendments to the constitution of the United States.

5. The said district court erred in holding that section 13 of chapter 110, of the general laws of the state of North Dakota for the year 1890, being section 13 of chapter 110, of the laws of the first session of the legislative ssembly of the state of North Dakota, is not void and unconstitutional, under article XIV of the amendments to the constitution of the United States.

6. The said district court erred in over-ruling the contention of said petitioner that those portions of the said section 13 of chapter 110, of the laws of 1890, of the state of North Dakota, which provide that an injunctional order may

be issued by any district court of the state of North Dakota, upon an affidavit or complaint, or both, of the state's attorney, attorney-general, or his assistant, upon information and belief, and those provisions of said section which provide that if an affidavit be presented to the court or judge stating or showing that intoxicating liquor is sold, bartered, or given away on certain premises the court or judge must at the time of granting the injunction, issue his warrant commanding the officer serving the writ at the time of such service to diligently search the premises, and if such officer upon such search shall find upon such premises any liquors of any kind he shall take and hold possession of such premises and keep the same closed until such final judgment; also those portions of said section which provide that leasehold premises may be taken and closed in the manner aforesaid, regardless of any guilty intent or knowledge on the part of the lessor; also those portions of said section which provide that the owner of the premises, in case the same are leased, must pay all costs and prepare and file a bond, with sureties, conditioned that he will immediately abate any nuisance upon said premises and prevent the same from being established or kept thereon within the period of one year thereafter before he can secure a return of such property, regardless of the guilt or innocence of said owner; also those portions of said section which provide for depriving a lessor of his property in the absence of any provision for making him a party to the action or giving him his day in court, are each and all unconstitutional and void, as contravening the provisions of article XIV of the amendments to the constitution of the United States.

7. The said district court erred in over-ruling the contention of said petitioner that said chapter 110 of the laws of 1890 of the state of North Dakota, and particularly section 13 thereof, conferred no authority upon the district court of the state of North Dakota to issue and make its order closing the building and premises in question, with the disobedience of which order the petitioner was charged, and upon which the said contempt proceedings were founded and based.

8. The said district court erred in over-ruling the contention of the petitioner that the said petitioner was by reason of such order and judgment committing him for contempt by the said district court, deprived of his liberty without due process of law.

BRIEF OF THE ARGUMENT.

The district court, from whose judgment this appeal is taken, in holding that appellant is not held or restrained of his liberty in violation of the constitution, or any laws of the United States, necessarily decided that the several orders made by the state court of North Dakota, particularly referred to, were made under a statute which does not contravene the provisions of article XIV of the amendments to the constitution of the United States. The title of the prohibition act of North Dakota, already referred to as chapter 110 of the laws of 1890 of that State, is as follows: "An Act to Prescribe Penalties for the Unlawful Manufacture, Sale and Keeping for Sale Intoxicating Liquors, and to Regulate the Sale, Barter and Giving Away of Such Liquors for Medical, Scientific and Mechanical Purposes." The full text of section 13, of that chapter, which is the only portion of the chapter germane to the matters to be presented, is as follows:

"All places where intoxicating liquors are sold, bartered or given away, in violation of any of the provisions of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this act, are hereby declared to be common nuisances; and if the existence of such nuisance be established, either in a criminal or equitable action, upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place, by taking possession thereof, if he has not already done so under the provisions of this act, and by taking possession of all such intoxicating liquors found therein, together with all signs, screens, bars, bottles, glasses and other property used in keeping and maintaining such nuisance, and such personal property so taken possession of shall, after judgment, be forthwith publicly destroyed by such officer, and the owner or keeper thereof shall, upon conviction, be adjudged guilty of maintaining a common nuisance, and shall for the first offense be punished by a fine not less than $200 nor more than $1,000, and by imprisonment in the county jail of not less than ninety days nor more than one year, and for the second and every successive offense be punished by imprisonment in the state's prison for a period

exceeding two years and not less than one; and said abating such nuisance shall securely close said building, erection or place where such nuisance was located as the use or occupation of the same for saloon purposes, the same securely closed for the period of one year, sooner released as hereinafter provided), and any breaking open said building, erection or place, or using premises so ordered to be closed, shall be punished for pt, as hereinafter provided, in case of violation of in-; *provided*, however, that when leasehold premises dged to be a nuisance, the owner thereof shall have t to terminate the lease by giving three days' notice in writing, to the tenant, and when this is done the s shall be turned over to the owner upon the order court or judge. But the release of the property shall upon the condition that the nuisances shall not be con-ued, and the return of the property shall not release any n upon said property occasioned by any prosecution of the tenant. If the owner appear and pay all costs of the proceedings and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court or judge, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within the period of one year thereafter, the court, or in vacation, the judge may, if satisfied of his good faith, order the premises taken and closed under the order of abatement, to be delivered to said owner, and said order of abatement cancelled so far as the same may relate to said property, and if the proceeding be an action in equity and bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated; *provided*, however, that the release of the property under the provisions of this section shall not release it from any judgment, lien or penalty or liability to which it may be subject under any other statute or law. The attorney-general, his assistant, state's attorney, or any citizen of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, except that the affidavit or complaint, or both, may be made by the state's attorney, attorney-general, or his assistant, upon information and belief; and no bond shall be required; and if an

affidavit shall be presented to the court or judge, stating or showing that intoxicating liquor, particularly describing the same, is kept for sale, or is sold, bartered or given away on the premises, particularly describing the same, where said nuisance is located contrary to law, the court or judge must at the same time of the granting the injunction, issue his warrant commanding the officer serving said writ of injunction at the time of such service to diligently search the premises and carefully invoice all the articles found therein, used in or about the carrying on of the unlawful business; for which search and invoicing said officer shall receive the sum of $10 in addition to the fees now allowed by law for serving an injunction. If such officer upon such search shall find upon such premises any intoxicating liquor or liquors of any kind, he shall take the same into his custody and securely hold the same to abide the final judgment in the action (the expenses for such holding to be taxed as part of the costs in the action); and such officer shall also take and hold possession of all personal property found on such premises, and shall take and hold possession of such premises and keep the same closed until such final judgment. The finding of such intoxicating liquor or liquors on such premises shall be *prima facie* evidence of the existence of the nuisance complained of. Any person violating the terms of any injunction granted in such proceeding shall be punished for contempt, for the first offense by a fine of not less than $200, nor more than $1,000, and by imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense of contempt be punished by imprisonment in the state's prison for a period not exceeding two years and not less than one, in the discretion of the court or judge thereof. In case judgment is rendered in favor of the plaintiff in any action brought under the provisions of this section, the court or judge rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff and against the defendants therein; which attorney's fee shall be taxed and collected as other costs therein, and when collected, paid to the attorney or attorneys of the plaintiff therein; *provided*, if such attorney be the state's attorney, such attorney's fee shall be paid into the county treasury, as in section 12 of this act provided. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this act, the court, or in vacation, the judge thereof, shall have the power to try

summarily, and punish the party or parties guilty as required by law. Processes shall run in the name of the state of North Dakota. The affidavits upon which the attachment for contempt issues, shall make a *prima facie* case for the state. The accused may plead in the same manner as to an indictment, in so far as the same is applicable. Evidence may be oral or in the form of affidavits, or both; the defendant may be required to make answer to interrogatories, either written or oral, as in the discretion of the court or judge may seem proper; the defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers; the clerk of the court shall, upon the application of either party, issue subpoenas for witnesses, and, except as above set forth, the practice in such contempt proceedings shall conform as nearly as may be to that adopted by the ninetieth rule of the supreme court of the United States for proceedings in equity in the circuit courts."

It will be observed from a comparison that many of the provisions of this section are materially different from the provisions of section 13, of the Kansas statute upon the same subject, passed upon and construed by this court in *Mugler* vs. *State of Kansas*, 123 *U. S.*, 623, and that such provisions are also materially different from the provisions of the *Code of Iowa, Title II, Chapter* 6, as amended by acts of 1884, chapter 143, on the same subject, passed upon and construed by this court in the case of *Bartemeyer* vs. *Iowa*, 85 *U. S.* 129, and *Kidd* vs. *Pearson*, 128 *U. S.*, 1.

Section 13 above set forth at length, in addition to the provisions to be found in the Kansas and Iowa statutes referred to, further provides:

FIRST. "The injunction shall be granted at the commencement of the action in the usual manner of granting injunctions, *except that the affidavit or complaint, or both, may be made by the state's attorney, attorney-general, or his assistant, upon information and belief.*"

SECOND. "If an affidavit shall be presented to the court or judge, stating or showing that intoxicating liquor * * * is kept for sale * * * contrary to law, the court or judge must at the same time of the granting the injunction issue his warrant commanding the officer * * * to diligently search the premises * * *. If such officer, upon such search, shall find upon such premises any intoxicating liquor * * *,

he shall take and hold possession of such premises, and keep the same closed until such final judgment."

THIRD. It provides that premises held by an alleged offender under lease may be taken and closed upon a complaint for an injunction verified upon information and belief, without reference to the innocence of the lessor and without making any provision for the service of any summons or process upon such lessor.

FOURTH. It contemplates and provides for the closing of leasehold premises for an indefinite time where the lessee is the offender, without providing for or even contemplating the making of the lessor or owner a party to the proceeding.

FIFTH. By closing up the premises and placing them in the hands of the sheriff without providing for making the owner a party to the proceeding in the case of leased premises, where the lessee is the alleged offender and without reference to the innocence of the lessor or owner, it seeks to compel the owner, whether resident or non-resident, to voluntarily make his appearance, or be deprived of his property without giving him his day in court.

SIXTH. Whether before or after hearing and judgment, as a condition of the return of the property to the owner, no matter how innocent, it provides that he shall pay all costs made in the proceeding, and that he furnish a bond conditioned that he immediately abate the alleged nuisance and prevent the establishment of any nuisance therein within the period of one year thereafter.

SEVENTH. It further provides that no return of the property to a lessor, whether he be innocent or not, shall be allowed, except upon the condition that the return shall not release any lien upon the property, occasioned by any prosecution of the tenant.

EIGHTH. In provides that any person using the premises so ordered to be closed, for any purpose, no matter how legitimate, shall be punished for contempt; it makes no distinction between premises owned by an alleged offender and premises leased to such offender, and this in the latter case regardless of the innocence of the owner or lessor.

NINTH. However innocent the owner or lessor of leased premises he cannot obtain a return of the premises before final judgment, and then only when he makes a voluntary appearance, except upon condition that he pay not only the ordinary costs of the suit or proceeding made against the tenant, which no action of his has entailed, but also the expenses

of the sheriff for holding all the personal property taken by him, to be taxed as part of the costs in the action and in addition thereto furnishing the bond already referred to.

The respects in which the Dakota act differs from the Kansas and Iowa acts passed upon by this court and in which the Dakota act makes additional provisions, as hereinabove pointed out, make it obnoxious legislation contravening the provisions of the amendment to the constitution referred to.

In providing that an injunction shall be granted upon a showing made by affidavit or complaint, or either, upon information and belief alone, it abrogates in the instance of a particular and restricted class of offenders, or alleged offenders, including with them those in a contractual relationship, however innocent, that salutary and well established rule of the common law that an injunction will not be issued except upon clear and satisfactory evidence. Of the correctness of the rule that an injunction will not be issued except upon such a showing, there can be no doubt.

High on Injunctions, Sec. 1567.

Goertner vs. *City of Fond du Lac*, 34 *Wis.*, 497.

Brooks & Hardy vs. *O'Hara Bros.*, 8 *Fed.*, 529.

Mugler vs. *Kansas*, *Supra*.

The Kansas statute was upheld for one reason, because its provisions left the court at liberty to give effect to the principle above enunciated that an injunction will not be granted to restrain a nuisance, except upon clear and satisfactory evidence that one exists. The statute in question cannot be upheld on the same ground. It distinctly and positively provides that no such showing need be made, nor any such evidence be adduced. On the contrary, the statute provides that if the other elements requisite and necessary are not wanting that the injunction *shall* be granted, notwithstanding, the affidavit or complaint, or both, fail to present clear and satisfactory evidence that a nuisance exists; and in respect to the matter of the positiveness of proof as to the existence of the nuisance leaves the court no discretion, provided, the affidavit or complaint, or both, state that the attorney-general, or other officer commencing the action or proceeding, has information and possesses belief to the effect that such nuisance does exist.

The proceeding in connection with the prosecution of the main offender, the one who actually engages in the unlawful sale of the liquor, is in its nature criminal; and while the statute pretends in theory to accord to the defendant, the main offender, the presumption that he is innocent until proven guilty, and while under the theory that the injunctional proceeding is but civil in its character that the plaintiff or as it is in fact the prosecution shall prevail ultimately only by the preponderance of the evidence, yet, in providing that a writ of injunction may issue upon the slender showing of an affidavit or a complaint verified upon information and belief alone, it practically thrusts upon the defendant, the main offender, the necessity of assuming the burden in any event to dissolve the injunction and imposes upon a lessor, however innocent, the necessity of voluntarily becoming a party to the action, and setting in motion the processes of the law which shall or can afford to him relief. The effect of such legislation, it seems to us, is to exercise the power of government as against an individual or a class, unrestrained by the established principles of private right and distributive justice. It is class legislation of the worst character and, it seems, clearly in violation of that provision of the constitution which provides that no state shall deprive any person of his property without due process of law, and no law shall be passed or enforced by any state which shall deny to any person within its jurisdiction the equal protection of the laws.

Upon the presentation of an affidavit that liquor has been sold upon the premises, the court, divested of all discretion in the premises, is commanded to issue its order to the Sheriff of the county directing him to search the premises in question. If the sheriff finds upon the premises what he is satisfied, in his judgment, is intoxicating liquor, without reference to the circumstances, it is made his duty and he is commanded to securely close the premises and hold possession of the same until final judgment. This officer is made, in so far as the time to elapse between the execution of the process and the final determination of the action, the absolute arbiter of and in him is vested absolutely the determination of the question, whether the article found by him is or is not intoxicating liquor.

As will be observed by reference to the title of the act in question, only those places are declared to be common nuisances in which intoxicating liquors are unlawfully manufactured, or sold, or kept for sale. The act in question in no manner attempts to restrict the use of liquors by a householder when kept upon his premises for his individual or domestic use, but as respects the duties of the sheriff having in his possession the search warrant, no distinction is made as between liquors found by him whether kept in violation of the statute or not. If he finds upon the premises any intoxicating liquors or *liquors of any kind*, he *shall* close up the premises and keep them closed. Under the letter of the act covering the provisions complained of, if a householder, otherwise innocent, shall have, in some isolated instance, given his neighbor of his liquors in store for his personal and domestic use, and an affidavit shall have been made of such gift, presenting the naked fact of such gift, the court must and is bound under the provisions of the statute to issue its search warrant regardless of the facts, none of which need be made to appear except the one fact that liquor has been given away; it has no discretion in the premises, and if the sheriff, upon executing such search warrant, finds upon such premises, be it the most magnificent or even the humblest habitation from which such gift was taken, he is in the exercise of his duty bound and compelled to close such habitation and keep the same closed until final judgment in the action.

The duty is imposed upon the sheriff without regard to his qualification. Under the provisions as they stand, however inexperienced in the use or the ability to detect the presence of intoxicating liquors, he is made the sole judge of their presence when executing the search warrant in his hands.

While it is true that in a criminal prosecution for violating the provisions of the act, the alleged offender before final judgment would be entitled to the verdict of a jury upon an issue raised as to the articles found being intoxicating liquors, yet as respects being deprived of the use of his property and perhaps the use of his usual habitation, he is subjected to the necessity of depending upon the correctness of the judgment of the sheriff as to whether the articles found and returned by him were in fact intoxicating or other liquors within the meaning of the act which he is charged with violating.

Three distinct ways, at least, are prescribed by the statute referred to, in which an innocent owner of property may be deprived of the use of his property for an indefinite length of time without being given his day in court, and these are:

FIRST. Where a judgment of conviction is entered against the occupant (who is not the owner of the property) in a criminal prosecution in which the occupant is charged with violating the provisions of the section referred to.

SECOND. In the case of leased premises where the state officer has proceeded in an equitable action to enjoin the occupant from maintaining a nuisance, and where judgment has been entered declaring the place a nuisance in which liquors are alleged to have been sold or given away contrary to the provisions of the act in question.

THIRD. Where in an equitable proceeding against the occupant to enjoin him from selling or giving away liquors in violation of the act in question, the prosecuting officer representing the state has also attempted to enjoin the owner of the property (the right to join whom as a party is, however, not admitted), and where by mistake or inadvertence, or otherwise, the true owner of the property is not joined as a party to the injunctional proceeding. This would also include a case where the occupant is a mere trespasser.

The act provides that "if the existence of such nuisance be established, either in a criminal or equitable action, upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his deputy or under sheriff, or any constable of the proper county, or marshal of any city where the same is located, shall be directed to shut up and abate such place, by taking possession thereof, if he has not already done so under the provisions of this act * * * and said officer abating such nuisance shall securely close said building, erection or place where such nuisance was located, as against the use or occupation of the same for saloon purposes, and keep the same securely closed for the period of one year (unless sooner released, as hereinafter provided.") It follows from this, that if the occupant be adjudged guilty in a criminal action of selling in any particular place liquors in violation of the act in question, such judgment in and of itself establishes and concludes the place to be a nuisance, and as a result of such judgment, the process of the court must issue, closing up such place. It certainly will not be seriously contended that the owner of the building or premises so adjudged to be a nuisance, where he is other than

the occupant or the person adjudged guilty, would be a necessary or either a proper or possible party to such a criminal prosecution, and, yet, he is bound by the judgment, and his property is subjected to the terms of the sentence and judgment, and under the provisions of the act but one remedy is afforded. If the premises be leased premises, the owner may "terminate the lease by giving three days' notice thereof, in writing, to the tenant," and, "if the owner appear and pay all costs of the proceedings and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court or judge, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within the period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order the premises taken and closed under the order of abatement, to be delivered to said owner, and said order of abatement cancelled so far as the same may relate to said property, and if the proceeding be an action in equity, and bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated." While it is true that in case of leased property the owner may secure a return of the property to himself either before judgment shall have been entered in a criminal prosecution against the tenant or an equitable action to enjoin him, as well as after the entry of sentence or judgment in either of such cases, yet, under the express terms of the statute a return can only be had upon an appearance by the owner, if the premises are merely leased, and the payment of all costs, and the giving of a bond as provided. No distinction is made between an innocent or guilty owner or lessor. The condition is imposed without respect to the intent. No provision is attempted to be made to determine his innocence or guilt. While it is provided that in a criminal or equitable action after judgment, the officer abating the nuisance shall securely close the building, etc., "as against the use or occupation of the same for saloon purposes," the effect in either of the three instances mentioned is the same as if the provision were that the officer should take and keep the building securely closed as against its use for any purpose, for, as shown, the only way in which the lessor or owner, be he other than the occupant, can obtain a return of the premises for any purpose, is by submitting to and performing the conditions referred to. If the proceeding be an equitable action to abate the nuisance,

commenced against the occupant, and the return of the sheriff be made upon the search warrant that liquors are found upon the premises, they are to be closed by the sheriff and he "shall take and hold possession of such premises and keep the same closed until the final judgment."

The only remedy here afforded to a lessor, or the owner of the property, in case of trespass by occupant, is that he must appear and pay all costs of the proceeding and file the bond referred to; that such conditions are also intended to be imposed before hearing and judgment, even in the case of an owner, not a party to an equitable proceeding against the tenant or occupant, cannot be doubted, for it provides that such a "bond be given and costs therein paid before judgment and order of abatement." Even as against the owner, though he be not a party to the criminal prosecution nor a party to the equitable action to abate the nuisance "the finding of such liquor or liquors on such premises shall be *prima facie* evidence of the existence of the nuisance complained of." When once determined either judicially in a prosecution against the tenant or in an equitable proceeding against him, that liquors have been sold or disposed of upon the premises in violation of the act, the result necessarily follows that the place is adjudged a nuisance, and as heretofore shown, even without such judicial determination, upon the return of the sheriff to the search warrant that he has, in his opinion, found upon the premises intoxicating or other liquors, the same result follows, to-wit, the closing up of the premises during the period to elapse between his return and the entry of final judgment in the action, and imposing upon the owner, in order to secure a return of his property, the performance of the conditions referred to. It will thus be seen that the state seeks to avail itself of three different remedies: *First*, the prosecution of the occupant; *Second*, the abatement of the alleged nuisance by injunction, a part of which procedure is the destruction of all liquors, and in the destruction of all bottles, screens, bars, etc., used in maintaining the nuisance, and, *Third*, in the distinct and unusual, and, as we insist, unlawful way of confiscating the building itself for an indefinite length of time by depriving the owner or the occupant of its use for any purpose, however legitimate. After the liquors and all other articles used in maintaining the nuisance shall have been removed from it, the building itself is taken and closed, although the owner himself may not have been a party to any proceeding

declaring it a nuisance, and may have been absolutely ignorant of the use to which it may have been put. "The power to abate a nuisance is limited to the removal of that in which the nuisance consists."

Welch vs. *Stowell*, 2 *Douglas, Mich.*, 332.

Babcock vs. *City of Buffalo*, 36 *N. Y.*, 268.

Bridge Company vs. *Paige*, 83 *N. Y.*, 189.

"By the settled doctrines of this court, the police power extends at least to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights," and "a prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit," but legislation should not "disturb the owner in the control or use of his property for lawful purposes."

Mugler Case, supra.

A distinction should be made between the exercise of police power to protect the lives, health and property of citizens by suppressing or abating, or even destroying a thing or article which is noxious and injurious in itself, and one which innocent and harmless in itself is only made otherwise by the use to which it is put. "The exercise of the police power by the destruction of property which is *itself* a public nuisance, or the prohibition of its use *in a particular way* * * * is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

Mugler case, supra.

Who would seriously claim that after a slaughter house had ceased to be used for slaughtering purposes and it had been purged of its filth, or after the inmates of a bawdy house had been removed and the house vacated, that it still lay within the police power of the state to close up either of such places and keep the same closed as against the owners, depriving them of their use for legitimate purposes or for purposes not defined by the law to be nuisances? We are persuaded that the statute in question in the case at bar is

subject to the arraignment made of the Kansas act by the plaintiff in error in the Mugler case and that the provisions here complained of certainly "cannot be enforced without infringing the constitutional rights of the citizen;" that under the guise of a police regulation, it is an effort to compel the owner of property to assist the state in preventing the violation of its laws and makes him a guarantor and insurer of the lawful conduct of his tenant.

We contend that the provisions of the Dakota act referred to are repugnant to the provisions of article XIV of the amendments to the constitution.

The district court had jurisdiction to entertain appellant's petition and to issue the writ of *habeas corpus* and to determine the propriety of petitioner's discharge.

Ex parte Royall, 117 *U. S.*, 241.

Ex parte Burford, 3 *Cranch*, *348*.

Roberts vs. *Reilly*, 116 *U. S.*, 80.

A federal court may issue a writ in favor of persons imprisoned for contempt, whether contempt was committed in performance of duty created by the constitution and laws of the United States, or while they were acting under the protection of the laws and constitution of the United States.

Case of Electoral College of S. C., 1 *Hugh*, 571.

In the case at bar both parties presented the matter in the district court upon the merits. It was conceded that there were such special circumstances as called for the interposition of the court. The court considered the case on the merits, and passed upon the question of the validity of the statute in question. It exercised its discretion to consider and review all the facts set forth in the petition, and its judgment was entered after a full hearing and is expressly stated by the court to have been made upon a consideration of the merits.

By this appeal appellant asks this court to review the decision and judgment of the district court so entered, holding the act referred to constitutional legislation.

For the reasons above given, we confidently maintain that the judgment of the district court should be reversed, and that such order and disposition be made as will afford to the prisoner his liberty.

Respectfully submitted,

MARSHALL A. SPOONER,
ARMSTRONG TAYLOR,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1893.

No. 1122.

EMIL J. PEPKE, APPELLANT,

vs.

JOSEPH E. CRONAN, AS SHERIFF OF WALSH COUNTY, NORTH DAKOTA, RESPONDENT.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

BRIEF OF WILLIAM H. STANDISH, ATTORNEY FOR DEFENDENT AND RESPONDENT.

FRANK D. LARRABEE, ARMSTRONG TAYLOR, SPOONER & TAYLOR, ATTORNEYS FOR APPELLANT.

I.

1 This suit is brought to determine the constitutionality of Section 13, of Chapter 110, of the laws of 1890, of the State of North Dakota, otherwise known as the Prohibition Law of that State; which section and act are claimed to be in violation of the United States Constitution in this: that the United States Constitution does not vest in a State Legislature, or permit a State Legislature to declare that a saloon for the sale of intoxicating liquors is a nuisance, and after a legislature has so declared and prescribed a remedy for its suppression, which remedy is uniform as to all defendants, who are the owners of the nuisance, or of the premises where the nuisance is maintained, whether those

defendants be residents or non-residents of the State, notwithstanding that the act requires evidence by affidavit of the existence of a nuisance before an order of search is made by the court, and the law and that order both require in addition to this evidence by affidavit that on the search being made the nuisance shall be found in the premises before they shall be closed. In this case the nuisance was actually found before the premises were closed, and personal service was then made upon the tenant, but the landlord, who had been made a party defendant, was a non-resident, and could not be personally served within the State, nor without the State, except by taking time for bringing him in by the usual publication process common in all the states against all non-resident defendants interested in the real estate which is involved in the subject matter of the controversy, and that in the interval after the siezure and the close of the nuisance and the making of personal service upon the tenant who was running the nuisance in premise closed, the landlord, without intervening in the equity suit, it is claimed could take forcible possession of the property and defy the State Court and its order under which act of defiance the defendant, as a hired agent of the landlord, having been given a key by the landlord and had entered, or broken into the premises and was holding the use and possession of them in defiance of the known order of the Court which had closed them. For which act he was arrested and jailed for, contempt, and to obtain his release from imprisonment applied directly to the United States
2 District Court for the State of North Dakota, by writ of *habeas corpus*, which writ was denied him, and from the order denying it he appeals to this Court and claims for error that the law giving the State Court jurisdiction *in rem* of the building containing the nuisance from the time the original writ in the suit in the State Court was served upon the tenant and upon the building by closing it after the liquor in contravention of law was found in it was illegal and void as to the non-resident defendant until actual service could be made on him by publication, or otherwise, in this, that it was depriving him for the time being of the use of his property without due process of law, and the fact that it was only an equitable proceeding in which he could at any time or any moment intervene and have a hearing in equity in chambers to have his building opened, in case it had been improperly closed, is of no avail. That this provision of Section 13 of

the law exceeded the police power of the State Legislature to make.

It is on this last point that the decision of this case must turn, as all of the errors assigned practically center in this one proposition. It was contended below that the law in question was void and the same assignment in error is made that the law is void because it made no *specific* provision for bringing in non-resident defendants. In other words it is contended that the Prohibition act in and of itself should have contained the code of civil and equity procedure in North Dakota, which by their terms are general and apply to all actions that could be brought under any laws in existence when the code was made or that could be enacted before these provisions of the code for bringing in non-resident defendants should be repealed; which provisions were in existence when this Prohibition Law was made, and are yet in force and to be found in Sections 4900, 4902, 4903, 5367, 5574, of the Revised Statutes of Dakota Territory, 1887.

We submit to the Court that the power is vested in a State Legislature for it to declare and define what shall constitute a nuisance; and that the sale and keeping for sale intoxicating liquors to be drank as a beverage in violation of certain conditions has been declared a nuisance and crime in nearly all, if not all of the states, and the power to make this legislation is unquestioned in them and has been upheld by many of the decisions of this Court, and the principle is too familiar to this Court to require the citation of authorities.

3 The sale of intoxicating liquors being a proper subject for the Legislature to declare a public nuisance, as much so as if the building in question contained yellow fever, small pox, or was being used to conduct gambling, or the business of prostitution, the Legislature was invested with discretionary power to say on what terms and by what means and measures the nuisance should be suppressed, as will be seen by reference to the following decisions:

Stone et al. v. Geo. E. Harris, Attorney General, 101 U. S. 814.
Boston Beer Co., v. Commonwealth of Massachusetts, 7th Otto 35, Vol. 24 containing 94 to 97 U. S. bottom page, 989.
People v. King, 110 N. Y. 423.
Thorpe v. Rutland & B. R. Co. 27 Ver. 139, see note at end of case.
Hannable &c. R. R. Co. v. Houson, 95 U. S. 405.
License Cases 5th. How. or 46 U. S. Page 504.
Monn v. Ill. 94 U. S. 113 Indianapolis & Cin. R. R. Co. v. Kercheval, 16 Ind 34.

It cannot be denied that a place for the sale of intoxicating liquors to be drank as a beverage is a nuisance in fact, and

that if there were any doubt about it being a nuisance in fact the Legislature had the power to declare it should be a nuisance, and that after it had made such declaration by enacting the statute under consideration, the premises in question became a nuisance in fact as much so in contemplation of law as if they had been a harbor for yellow fever, small pox, gambling or prostitution, and the following authorities establish that the Legislature could provide for their being closed and held by the Court before personal service had been made on the owner, and the owners brought in later by service, if they did not choose to voluntarily intervene. See cases:

Davidson v. New Orleans, 96 U. S. 97, or page 316, vol. 24 L. C. Ed.
People v. Mayor of Brooklyn, 4th, N. Y. 419.
Lent v. Tillotson, 79, Cal. 418.
Hagar v. Reclamation, 111 U. S. 701, or page 569, 28 vol. L. C. Ed.
Weber v. Reinhart, 75 Penn. State 370.
Bryers v. Commissioners, 72 N. Y., 1.
James Kelley v, Pittsburg, 104 U. S. 78, or 26 L. C. Ed. page 658; also
People v. Budd, 117 N. Y., or 22 N. E. and 13 Sup. Rep. 468; also
North Dakota v. Grass & Hoskins, 482.
State v. Addingtonn, 13 Mo. appeals 214.
Burthold & O'Reilly, 74 N. Y. 500.
Ex Parto A. Fook, 49 Cal. 402.
The City of Salem v. R. R. Co., 98 Mass., 431.
Coe v. Shultz 47 Barber, N. Y. 464.

A law authorizing a gambling house to be closed before trial and its furniture siezed and held before there has been a trial was held valid in the following cases:

Commonwealth v. certain gambling implements 141 Mass., 114, same kind of a case 119 Mass., 332.
Willis v. Warren, 1. Hill, 490.

4 Under a construction given to this law by Mr. Charles A. Pollock, of Fargo, who assisted me in the hearing below, and who is known as the author of this Prohibition Law, that the owner to permit his building to be used for the illegal sale of liquor must *know* of the fact that illegal sales of liquor are being made within the building would bring this case in that event within the category of the Kansas decision, (Cordes *v.* State, 37 Kansas 48) where the phrase "against owner" is construed to be with the owner's *actual* knowledge, and would enable the Kansas decision to apply to this case in the construction of this law, and have enabled the defendant landlord if he had chosen to intervene in the State Court, to have shown to the Court his want of knowledge of the fact that *his* building was being used for the illegal sale of liquor, and in that event he could have secured

a release and surrender of the property to himself without the payment of any costs; and if that should have been the proper construction if denied this right he could have appealed to the Supreme Court, and then if he had any United States Constitutional right that had been denied him he could have come in the usual way to this Court.

It is our belief and contention, however, that any State Legislature, in order to prevent the creation of nuisances, has a right to punish landlords for their negligence, and prevent gross carelessness on their part, where if care had been exercised by them the nuisance could not have arisen. The police power of a State Legislature is almost without limit to fix regulations to prevent as well as to punish what will be harmful to the public, and unless this rule exists to both prevent and punish landlords for permitting their premises to carry on classes of business declared by legislation to be a nuisance, it is shorn largely of its legislative police power, as in most instances, in such cases, it could be made impossible to secure any evidence to establish actual knowledge on the part of the landlord that his premises were being used for an unlawful or prohibited purpose, especially whereas in this case the defendant would be a non-resident of the State in which the nuisance was located, and it would inaugurate a policy with the saloon, or "Blind Pig" fraternity of North Dakota
5 before entering upon their illegal business of fictitiously conveying the premises in which they would expect to conduct their illegal business to the wholesale liquor men, or firm, in some other State from which they would expect to obtain their supplies.

We will next call the Court's attention to page 21 of the published record in this case, which shows that before we had entered any appearance, or filed any answer, we made a motion to dismiss which (omiting title) reads as follows:

"Said J. E. Cronan, as said sheriff, saves and reserves to himself, not wishing to consent to its jurisdiction herein, *and* moves the Court to dismiss the said application for these reasons:

First. The Court has no jurisdiction thereof for the reason that it does not appear that said petitioner is a non-resident of the State of North Dakota, nor does it involve the violation of any criminal law or statute enacted by Congress, nor does it come into this Court by any process of removal of a case from a State Court under any United States statutes,

nor is there any mode of appeal authorized to start an original suit in this Court to review a decree of a State Court of co-ordinate jurisdiction and for other causes apparent on the record.

W. H. STANDISH,

As Attorney General of North Dakota, Attorney for said J. E. Cronan, as Sheriff.

On the back of said notice to dismiss appear endorsements in words and figures following, to-wit:

Case No. 15. United States of America *ex rel* Emil J. Pepke v. J. E. Cronan as Sheriff. Motion to dismiss *habeas corpus*. Filed Dec. 14, 1893. J. A. Montgomery, Clerk, by H. G. Edwards, Deputy."

As soon as this motion had been filed and read to the Court it was suggested that during the last twenty years since we had occasion to look this matter up in a case that we argued before this Court, known as the case of The Home Life Insurance Company, of Brooklyn, N. Y., vs. Lucinda M. Dunn, Administratrix, 19 Wall, 214, that Congress had enacted especial legislation which invested the District Court with power to take original jurisdiction in this case, and
6 thereupon no further argument on that point was made; but the failing to make the argument was no waver of the point raised by the motion, and the record of this case shows that the point was taken in the proper time and in the proper manner to bring this case within the settled practice of this Court, which is, that while its District Courts are invested with original jurisdiction to entertain this class of suits that the rule of harmony and courtesy that should prevail between the State and Federal jurisdictions and that other rule which prevails in certain instances, that the Court obtaining the first jurisdiction should retain it, makes it advisable for this Court to require that when this suit had started in the State Court that this defendant landlord should have intervened in that case and asserted his rights, and if denied them in the District Court of the State, then he should have appealed to the Supreme Court of the State, and then if denied his United States' Constitutional right, that he should have then come from the Supreme Court of the State to this Court, and this rule adhered to, not only conforms to the established comity that should prevail between the State and Federal jurisdictions, but would tend to lessen the labors of this Court, as this defendant might have obtained, if he is right, all in the Supreme Court of the State that he is

seeking here, which would have prevented the matter reaching this Court. See the following cases:

In re Rahrer, 43 Fed., 556
In re Christenson, 43 Fed., 243, which was overruled in Crowley vs. Christensen, 137 U. S., 86.

In order to show to what extent the police power of the State can be exercised by the Legislature without interfering with that part of the United States Constitution which relates to private vested rights, we refer the Court to the following decisions in addition to those heretofore cited:

Minneapolis, St. Paul & Sault Ste. Marie R. R. Co. vs. Milner et al, 57 Fed. Rep., 276.
State vs. R. R. Co., 24 West Vir., 783.
Hennington vs. State, 17 S. E. Rep., 1009.
People vs. Cannon, 34 S. E. Rep., 759.

7 This Prohibition Law has been considered as to the sufficiency of its title and in relation to other points where it is claimed to be in violation of the State Constitution in the following cases:

State ex rel Fraser, 1 N. D., 538.
State vs. Haas, 2 N. D., 202, (as to title of act.)
State ex rel Larabee vs. Barnes, 55 N. W. Rep., 883 (N. D.)

In the last case above are raised and determined many of the questions suggested on the printed record of this case.

The above decisions on the points to which they relate bearing on the State Constitution, and the title of the act conclude this Court, on the ground that this Court adopts and follows the decisions of the State Supreme Courts as to the construction of their own State laws, and whether the same are in harmony with their own State Constitution, and furthermore the investigation of a matter pending in the State Court, when it reaches this Court is confined to questions raised below where some right is claimed under the United States Constitution, or United States law or treaty, and the decision of the State Court is against the right claimed.

For the convenience of the Court we append Section 13, of Chapter 110, Laws of North Dakota, dissected so as to show the statutes from which the same was borrowed. Those parts which are original are so marked:

SEC. 13. All places where intoxicating liquors are sold, bartered or given away, in violation of any provisions of this act, or where persons are permitted to resort
1 for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this act, are hereby declared to be common nuisances; *Kansas, Sec. 2533, Vol. 1, Stat. 1889.*

and
2 if the existence of such nuisance be established, either in a criminal or equitable action, *Iowa Sec. 2380, 1 McLean's An. Code, 1888.*

upon the judgment of a court or judge having jurisdiction, finding such place to be a nuisance, the sheriff, his dep-
3 uty or under sheriff, or any constable of the proper county or marshal of any city where the same is located, shall be directed to shut up and abate such place, by taking possession thereof, *Kansas, Sec. 2533, Supra.*

8 if he has not
4 already done so under the provisions of this act *Original.*

and by taking possession of all such intoxicating liquors found therein, together with all signs, screens,
5 bars, bottles, glasses and other property used in keeping and maintaining such nuisance, and such personal property so taken possession of shall, *Kansas, Sec. 2533, Supra.*

6 after judgment *Original.*

be forthwith publically destroyed by such officer, and the owner or keeper thereof
7 shall upon conviction be adjudged guilty of maintaining a common nuisance, *Kansas, Sec. 2533, Supra.*

and shall for the first offense be punished by a fine not less than $200 nor more than $1,000, and by imprisonment in the county jail of not less than ninety days nor more
8 than one year, and for the second and every successive offense be punished by imprisonment in the state prison for a period not exceeding two years and not less than one; and said officer abating such nuisance shall

Original.

securely close said building, erection or place, where such nuisance was located, as against the use or occupation of the same for saloon purposes and keep the same securely closed for the period of one year (unless sooner released as hereinafter provided), and any person breaking open said building, erection or place, or using the premises so ordered to be closed, shall be punished for contempt, as hereinafter provided, in case of violation of injunctions; *provided*, however,
9 that when lease-hold premises are adjudged to be a nuisance, the owner thereof shall have a right to terminate the lease by giving three days' notice thereof, in writing, to the tenant, and when this is
9 done the premises shall be turned over to the owner upon the order of the Court or judge. But the release of the property shall be upon the condition that the nuisances shall not be continued, and the return of the property shall not release any lien upon said property occasioned by any prosecution of the tenant.

Iowa, Section 2389, Supra.

If the owner appear and pay all costs of the proceedings and file a bond with sureties to be approved by the clerk in the
10 full value of the property to be ascertained by the Court or judge, conditioned that he will immediately abate said nuisance

Iowa, Sec. 2391, McLean's Stat. 1888

and prevent the same from being established or kept therein within the period of one year thereafter the Court, or in vacation the judge may, if satisfied of his good faith, order the premises taken and closed
10 under the order of abatement, to be delivered to said owner, and said order of abatement cancelled so far as the same may relate to said property, and if the proceeding be an action in equity and bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated; *provided*, however that the release of the property under the provisions of this section shall not release it from any judgment, lien or penalty, or liability to which it may be subject under any other statute or law.

Iowa, Sec. 2301, McLean's Stat. 1888

The attorney general, his assistant, state's attorney, or any citizen of the county where such nuisance exists, or is kept, or is
11 maintained, may maintain an action in the name of the State to abate and perpetually enjoin the same. The injunction shall be granted at the commencement of the action

Kansas, Sec. 2533, Supra.

in the usual manner of granting in-
10 junctions, except that the affidavit
12 or complaint, or both, may be made by the state's attorney, attorney general or his assistant upon information and belief;

Original.

13 and no bond will be required;

Kansas, Sec. 2533, Supra.

and if an affidavit shall be presented to the Court or judge, stating or showing that intoxicating liquor, particularly describing the same, is kept for sale, or is sold, bartered or given away on the premises, particularly describing the same, where said nuisance is located contrary to law, the

Original.

Court or judge must at the same time of the granting the injunction issue his warrant commanding the officer serving said writ of injunction, at the time of such service to dilligently search the premises and carefully invoice all the articles found therein, used in or about the carrying on of the unlawful business; for which search and invoicing said officer shall receive the sum of $10 in addition to the fees now allowed by law for serving an injunction. If such officer upon such search shall find upon such premises any intoxicating liquor or liquors of any kind, he shall take the
14 same into his custody and securely hold the same to abide the final judgment in the action (the expense of such holding to be taxed as part of the costs in the action); and such officer shall also take and hold possession of all personal property found on such premises, and shall take and hold possession of such premises and keep the same closed until such final judgment. The finding of such intoxicating liquor or liquors on such premises shall be prima facie evidence of the existence of the nuisance complained of. Any person violating the terms of any injunc-
11 tion granted in such proceeding shall be punished for contempt, for the first offense by a fine of not less than $200 nor more than $1,000, and by imprisonment in the county jail not less than ninety days nor more than one year, and for the second and every successive offense of contempt be punished by imprisonment in the state's prison for a period not exceeding two years and not less than one in the discretion of the Court or judge thereof,

Original.

In case judgment is rendered in favor of
15 the plaintiff in any action brought under the provisions of this section, the Court

Kansas, Sec. 2533, Supra.

16 or judge, } *Original.*

rendering the same shall also render judgment for a reasonable attorney's fee in such action in favor of the plaintiff and against the defendants therein; which attorney's fees shall be taxed and collected as other costs therein, and when collected paid to the attorney or attorneys of the plaintiff therein;

17 } *Kansas, Sec. 2533, Supra.*

provided, if such attorney be the state's attorney such attorney's fees shall be paid into the county treasury as in Section 12 of this act provided. In contempt proceedings arising out of the violation of any injunction granted under the provisions of this act, the Court, or in vacation the judge thereof, shall have the power to try summarily and punish the party or parties guilty as required by law. Processes shall run in the name of the State of North Dakota. The affidavits upon which the attachment for contempt issues, shall make a prima facie case for the State. The accused may plead in the same manner as to an indictment, in so far as the same is applicable. Evidence may be oral or in the form of affidavits, or both; the defendant may be required to make answer to interrogatories, either written or oral, as in the discretion of the Court or judge may seem proper; the defendant shall not necessarily be discharged upon his denial of the facts stated in the moving papers; the clerk of the Court shall upon the application of either party issue subpœnas for witnesses, and, except as above set forth, the practice in such contempt proceedings shall conform as nearly as may be to that adopted by the ninetieth rule of the Supreme Court of the United States for proceedings in equity in the Circuit Courts.

18 } *Original.*

12

In drafting the above section, it was sought to provide a speedy remedy for suppressing the nuisance—keeping in mind the arrangements relative to the holding of courts in our new state.

In most of the counties there are but two terms of court at intervals of six months apart. Many counties have but one term a year.

Unless the Court can under its process take and hold the premises *during the pendency of the action*, one of the prime objects of the law will be defeated—for it is well known to those having experience in enforcing prohibitory laws, that, unless the *place* is prevented from being open, *persons* can easily be found to continue the business.

In the case at bar a non-resident owner is complaining.

There can be no difference in law between a resident and non-resident owner with reference to the property. The one is brought into court by personal—the other by substituted service.

A glance at Section 13 will show that the *innocent* holder is fully protected.

In drafting the law an error in *arrangement* was made in this, that clause 10 above should have appeared after clause 14. This, however, under well settled principles of construction will make no difference. It will be observed that clauses 9 and 10 above were taken from different sections of the Iowa statute (2389 and 2391, respectively).

13 Section 13 here under consideration really has two general divisions; the second beginning with clause 14 above.

By this section it will appear that the *search warrant* feature is added to the injunctional remedy before in the section provided for. If, then Cordes *vs.* State, 37 Kansas, 48, (14 Pac. 493) controls our Court in the matter of costs being taxed upon *innocent* owners, certainly clause 10 above, together with the general statutes providing for intervention, affords ample opportutity for relief to such innocent owner.

We contend, however, that it is clearly within the police power of the State to compel owner to give the bond required by clause 10 above.

All questions as to there *being a lien* to be released would be determined when the lien was sought to be enforced. Should the owner be able to show that he was an *innocent* owner and did not *knowingly* permit the use of the place for an unlawful purpose, then under the rule of Cordes *vs.* State supra, the lien would be released.

WILLIAM H. STANDISH,
Attorney General North Dakota,
and Attorney for Defendant.